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Supreme Court of the United States

OCTOBER TERM, 1961

No. 92

RUDOLPH SCHWARTZ, PETITIONER,

vs.

BOARD OF BAR EXAMINERS OF THE STATE OF
NEW MEXICO

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE
OF NEW MEXICO

PERMANENT FOR HABEAS CORPUS FILED MAY 12, 1962

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 92

RUDOLPH SCHWARE, PETITIONER,

vs.

**BOARD OF BAR EXAMINERS OF THE STATE OF
NEW MEXICO**

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OF NEW MEXICO

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 5847

RUDOLPH SCHWARE, Petitioner

VS.

**BOARD OF BAR EXAMINERS OF THE STATE OF NEW MEXICO,
Respondent**

PETITION TO REVIEW DENIAL OF THE APPLICATION OF RUDOLPH SCHWARE TO TAKE THE BAR EXAMINATION OF THE STATE OF NEW MEXICO—Filed August 25, 1954

Petitioner Rudolph Schware respectfully applies for an order to review the denial of the application of the Petitioner to take the bar examination of the State of New Mexico in order that he may be entitled to practice law in the State of New Mexico. Jurisdiction is based upon the plenary and inherent power of this Honorable Court to regulate the practice of law and upon the provision of 18-101 of the laws of the State of New Mexico, which creates the Board of Bar Examiners, subject to the approval of this Honorable Court.

The Petitioner sets forth the following facts as the basis of his petition:

[fol. 2] 1. That in December of 1953 your Petitioner filed with the Respondent his application to be permitted to take the bar examination to be held in February, 1954. The application was filed in a form prescribed by the Committee of Bar Examiners.

2. That the Petitioner fully, truthfully and accurately answered each and every question propounded to him in said application.

3. That your applicant fulfilled all the conditions and requirements established for permission to take the bar examination.

4. That your Petitioner was advised that he was entitled to take the bar examination to be held in February, 1954,

and that on appearing at the Supreme Court in Santa Fe, New Mexico on February 22, 1954, he was advised by the members of the Bar Examiners that he was not entitled to take the examination.

5. That your Petitioner at that time was given an informal hearing before the said Board of Examiners, at which time he fully, completely and truthfully answered all questions propounded to him, and at the conclusion of said informal hearing he was again advised that he was not entitled to take the bar examination.

6. That no record was made of what transpired at said informal hearing, nor was your Petitioner ever informed either in writing or verbally as to the basis for the Bar Examiners' refusal to allow him to take said examination.

7. That on May 21, 1954, Petitioner, through his attorney, addressed a letter to the said Bar Examiners asking [fol. 3] that he be given an opportunity to appear personally before the Committee, and that he be furnished with "the reasons and the basis for your reasons holding that he is not entitled to take the bar examination". In the same letter it was requested that he be supplied with the names of any witnesses who may have given information adverse to your Petitioner, and it was further asked that his counsel be allowed to "inspect the records and files dealing with the inquiry into Mr. Schwere's moral character".

8. On June 16, 1954, a letter was addressed to Petitioner's counsel by Bryan G. Johnson, Chairman of the Board of Bar Examiners, and was advised that a special meeting of the Board of Bar Examiners would be held on July 16, 1954 "for the purpose of hearing any matters that Mr. Schwere may desire to present or discuss with the Board". The letter further stated that counsel for Petitioner had the "right to inspect the *public records* in the office of the Clerk of the Supreme Court".

9. That on July 16, 1954, your Petitioner, together with his counsel and witnesses, appeared before said Bar Examiners in the office of Bryan G. Johnson, Chairman of the Board of Bar Examiners, at Albuquerque, New Mexico, and there *was* present the following members of the Board of Bar Examiners: Bryan G. Johnson, L. C. White, Frank

Andrews, Ross L. Malone, Howard F. Houk, W. C. Whatley and Lowell Green, Secretary.

10. At the hearing on July 16, 1954, for the first time, your Petitioner was given the following memorandum, or so-called minutes of the Bar Examiners (T. R. 3):

"No. 1309, Rudolph Schware. It is moved by Board Member Frank Andrews that the application of Rudolph Schware to take the bar examination be denied for the reasons that, taking into consideration the use of aliases by [fol. 4] the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed."

11. At the hearing, counsel for Petitioner was refused the right to examine certain records in the custody of the Board of Bar Examiners (T. R. 7). Counsel for Petitioner was advised that it could not assume that there was nothing adverse in these secret reports. (T. R. 7).

12. That at the hearing on July 16, 1954, the Petitioner testified and produced witnesses and letters of recommendation showing that he was a person of good moral character. A full, true and correct copy of the official reporter's record of the hearing is attached hereto and made a part hereof.

13. That thereafter Petitioner received from Lowell C. Green, Secretary of said Bar Examiners the following extract from the minutes of the Board of Bar Examiners:

"The Board of Bar Examiners of the State of New Mexico convened in a special meeting at 2:30 p. m. on Friday, July 16, 1954, at Room 712 First National Bank Building, in Albuquerque, New Mexico, for the purpose of reconsidering the action taken by the Board of Bar Examiners in refusing permission to Rudolph Schware to take the bar examination at the February, 1954; meeting of the Board; that Rudolph Schware appeared in person and by his attorney P. H. Dunleavy, Esq.; that evidence was produced in behalf of said Rudolph Schware and a stenograph [fol. 5] record was made of said proceedings; at the con-

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clusion of the hearing the Board, after due consideration of the evidence introduced, was of the unanimous opinion that the former determination should stand and affirmed its former action on the application of the said Rudolph Schwere taken on February 22, 1954."

14. This petition to the Supreme Court is for a review of the decision of the Board of Bar Examiners contained in the minutes in paragraph 13 above.

15. Your Petitioner requests a review of the decision of the Committee of Bar Examiners for the following reasons:

(1) Your Petitioner showed conclusively that he is a person of good moral character, and meets all the other requirements established by law in the State of New Mexico for applicants for admission to the Bar.

(2) That the committee erred in stating that its previous determination should stand, particularly when the basis for such previous determination does not appear in any record.

(3) That no lawful evidence was received or exists supporting the refusal of the application of the Petitioner.

(4) That the committee erred in failing to inform your Petitioner of the names of the witness or witnesses who may have given any adverse reports, and in failing to give Petitioner full access to all records [fol. 6] which were used by the committee as a basis for rejecting his application.

(5) That your Petitioner was not given a reasonable opportunity to either examine or rebut any adverse information that the committee may have had.

(6) That the denial of the application of the Petitioner violates the rights of the Petitioner under the First Amendment to the Constitution of the United States.

(7) That the denial of the application violates the Fifth Amendment to the Constitution of the United States in that it deprives Petitioner of liberty or property without due process of law.

(8) That the denial of the application violates the

Fourteenth Amendment of the Constitution of the United States in that it is an attempt by the State of New Mexico, acting through its Committee of Bar Examiners, to deprive Petitioner of liberty or property without due process of law, and denies Petitioner the equal protection of the laws.

(9) That Sec. 1, Chap. 22, Session Laws of 1949, 18-108 N. M. S. A. Supp. is unconstitutional and void in violation of Sec. 11, Art. 3 and Sec. 1, Art. 6 of the Constitution of the State of New Mexico because it is the delegation of a judicial duty to said Board of Bar Examiners; and for the further reasons that said 1 is vague and indefinite because of its failure to set any standards upon which to examine applicants and [fol. 7] recommend their admission.

(10) That Sec. 1, Chap. 96, Session Laws of 1941, 18-101 is unconstitutional and void because it is vague and indefinite and fails to set any standards to determine qualifications for admission to the Bar.

(11) That Sec. 2, Rule IV, of the Rules Governing Admission to the Bar, adopted January 10, 1945, which provides that no person will be recommended for admission to the Bar unless "he is a person of good moral character" is unconstitutional and void for the reason that it is so vague and indefinite as to be wholly meaningless and incapable of definition; and it fails to set any standards for determining the meaning of "good moral character".

(12) That the action of the Board in refusing to recommend Petitioner to take the bar examination was arbitrary and capricious.

Wherefore, your Petitioner prays that this Court enter its order requiring that the Secretary of the Board of Bar Examiners supply to this Court all records, documents, reports and papers in the possession of said Board of Bar Examiners dealing with the application of the Petitioner; and further that the Court enter its order for a review of the denial of Petitioner's application to take the bar examination, and that it be adjudged that the Petitioner should be permitted to take said bar examination and that

counsel for Petitioner should have thirty days in which to file a brief in support of this Petition; and that this Court should enter such other and further relief as may be just [fol. 8] and proper in the premises.

(S.) Rydolph Schware, Petitioner.

The undersigned hereby certifies that a copy of the foregoing pleading was this 25th day of August 1954, mailed to The Attorney General of the State of New Mexico.

(S.) P. H. Dunleavy.

[File endorsement omitted.]

IN SUPREME COURT OF NEW MEXICO

ORDER TO SHOW CAUSE—August 25, 1954

This matter coming on for consideration by the Court upon Petition to Review Denial of the Application of Rudolph Schware to take the Bar Examination of the State of New Mexico, and the Court having considered said Petition and being fully advised,

It is ordered that the Board of Bar Examiners of the State of New Mexico, Respondent herein, appear before this Court on the 24th day of September, 1954, at the hour of 10:00 o'clock a. m., then and there to show cause, if any [fol. 9] there may be, why the prayer contained in said Petition should not be granted.

Dated this 25th day of August, 1954.

(S.) James B. McGhee, Chief Justice of the Supreme Court of the State of New Mexico.

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IN SUPREME COURT OF NEW MEXICO

**Transcript of Special Meeting of the Board of Bar
Examiners**

Held the 16th day of July, 1954, at 715 First National Bank Building, Albuquerque, New Mexico.

Present: Mr. Bryan G. Johnson, presiding, Mr. L. C. White, Mr. Frank Andrews, Mr. Ross L. Malone, Mr. Howard F. Houk, Mr. W. C. Whatley, Mr. Lowell Green.

[fol. 10] **APPEARANCES:**

For Mr. Schware: Mr. Philip H. Dunleavy, Attorney at Law, 217 Sixth SW, Albuquerque, New Mexico.

COLLOQUY BETWEEN EXAMINERS AND COUNSEL

Mr. Johnson: Let the record show that this is a special meeting of the Board of Bar Examiners which is being held at 715 First National Bank Building on this 16th day of July, 1954. The reason for this special meeting is to afford a hearing to Mr. Rudolph Schware concerning his eligibility to take the New Mexico Bar Examination. He is represented here by Philip H. Dunleavy, Attorney at Law, who [fol. 11] under date of May 21, 1954, wrote a letter to the Board of Bar Examiners requesting the opportunity to present matters in behalf of his client to this Board. Under date of June 16, 1954, a letter was sent to Mr. Dunleavy advising him of the special meeting now being held.

Let the record show that in attendance at this meeting are Charles—L. C. White, Frank Andrews, Ross L. Malone, Wayne Whatley, and Bryan G. Johnson, regular members of the Board, and also Mr. Howard Houk, who sat as one of the members of the Bar Examiners at the time Mr. Schware's application was considered.

Also, let the record show that Mr. Lowell Green, Secretary of the Board of Bar Examiners is in attendance at this meeting.

Now Mr. Dunleavy, you have requested this hearing and the Board felt that he should have a special meeting rather than to have Mr. Schwere appear at our regular meeting, which would be too late for him to take the Bar Examination in August, if the Board should determine that he is to be permitted to at that time. For your information, the action that was taken with respect to Mr. Schwere is contained in the minutes of the meeting of the Board of Bar Examiners and the action shown by these minutes. I will ask the reporter to incorporate into the record here these minutes.

(Minutes Referred to by Mr. Johnson)

"No. 1309, Rudolph Schwere. It is moved by Board Member Frank Andrews that the application of Rudolph Schwere to take the bar examination be denied for the reason that, taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed."

Mr. Johnson: You can have it later, Mr. Dunleavy.

Mr. Dunleavy: You want me to proceed?

Mr. Johnson: Yes. Now as far as I am concerned this may be as formal or as informal as you wish. We have no set rules on this and you proceed whatever way you want on it and have questions or anything else.

Mr. Dunleavy: Judge, I would like first of all to—may I assume that you are sitting as Chairman of this Board?

Mr. Johnson: Yes, that is a reasonable assumption to make.

Mr. Dunleavy: I would like to first have introduced into the record the letter which I addressed to the Board on May 25, 1954, and I would specifically at this time like to call the attention to the fifth paragraph of the letter in which it is stated as his attorney, I am asking you at this time to furnish me with the reasons and the basis for your reasons holding that he is a person not entitled to take the Bar Examination. I would appreciate your giving me the

names of any witness or witnesses who may have given you information allowing you to come to the conclusion that you did. Finally, I would appreciate authorization from you to inspect the records and files dealing with your inquiry into Mr. Schware's moral character, taking the three items that are contained in that paragraph.

[fol. 13] This is the first time I have been formally advised as to the basis of the refusal and for the purposes of the record I would like to have it understood that the issues which we must overcome are those dealing with the use of aliases by the applicant. That was the first reason. Second, his former connection with subversive organizations and his records of arrest. Now those I believe are the formal issues which we must overcome. That is, those are the facts upon which you came to the conclusion that he was a person not entitled to take the Bar Examination, is that correct?

Mr. Johnson: They were the motivating circumstances.

Mr. Dunleavy: Yes, sir.

Mr. Malone: I think it should be clear, however, Mr. Chairman, that those aren't issues to be overcome here. There are certain things that the Board wants to be informed on but I don't take it that there are any issues here or any burden of proof. The rules require that an applicant satisfy the Board of his good moral character and that, in the final analysis, is the requirement that every applicant must meet and the basis for this consideration, not particularly those three things. It is correct, however, that those are the three preponderating considerations that were reflected in the Board's action at that time.

Mr. Dunleavy: Now the second point is, I would like to have introduced into the record the letter from Judge Johnson, dated June 16th authorizing me to inspect the records in Santa Fe. The only information I found in there was that information which was furnished by the applicant, Mr. Schware, and if there is any other data you [fol. 14] may have I would appreciate being informed of it and if you have the names of any witnesses, who may have given you adverse reports on the reputation or character of Mr. Schware, I'd be pleased if I could see those.

Mr. Johnson: The only information which we have avail-

able for your inspection is the file which you say that you have already seen. For your information this Board makes an endeavor to learn from whatever confidential sources it may have available the past history and record of the applicants for admission to the Bar.

Mr. Malone: Would you want to state there, Mr. Chairman, that is pursuant to the written consent of the applicant at the time that he filed his application?

Mr. Johnson: Yes. At the time that the applicant applies for admission, he gives a consent that we may make such an investigation. That investigation is of course more complete where a lawyer is involved who has practiced previously in another jurisdiction and comes here and asks for admission. You understand that, because he has his references of his clients and of other members of the Bar from whence he comes and so that investigation is much more complete than one who has never practiced. But in the last few years we have undertaken to make such check as we could within our limited means, even of those who are first applying for admission to law school.

Those records are considered confidential and with the knowledge that we gain from those sources we enable a man, give him the opportunity to meet whatever the situation may be without disclosing the informant and so forth and I don't think we have ever done anything to the detriment of an applicant on the basis of hearsay evidence. There's usually been—whatever was involved, the man would be informed of the general situation and given an opportunity to explain. So that you will understand what I am getting at, for example, in a particular applicant one time we found that he'd made a statement something to the effect that he'd never been arrested and never been in any trouble and our investigation, confidential investigation disclosed that he had. Now we didn't go on that but it gave us something to discuss with him and when he was confronted with it he admitted that it was true. Now something like that happened where a man would deny it or we wouldn't go on the strength of that with a mere report, we'd substantiate it ourselves or either establish that it wasn't true. But I mean that it usually comes to a proposition of final action is taken on what we know and what the man discloses and therefore,

while many of these things that we do gather have to be confidential or we'd never get the information. We only seek it because we have permission to do so. We have to treat it that way.

Mr. Dunleavy: Yes, Judge.

Mr. Johnson: I wanted to give you an idea we are not—at least we hope we are not a Star Chamber outfit even though there are things here which we are telling you that we have looked at and that we have had that we are not going to disclose to anybody.

[fol. 16] Mr. Dunleavy: Of course, I will have to accept your refusal to allow me to examine them.

Mr. Johnson: That is right.

Mr. Dunleavy: And since you are, I presume, refusing to allow me to examine them, I was wondering if you would advise me whether in that report you obtained any information that is derogatory to Mr. Schware.

Mr. Johnson: Well, now I am speaking from memory and I want to be corrected by any member of the Board if I am wrong, I think that anything that involved Mr. Schware have been matters that he's openly and freely disclosed to this Board. Isn't that so?

Mr. Malone: That is my recollection, Mr. Chairman. I wouldn't want the Board to be bound by the statement without checking it but—

Mr. Johnson: I don't think our action was motivated in any way by any accusations or anything was made against him or were disclosed in some way by a report.

Mr. Dunleavy: Can I assume then that there is nothing adverse in that report?

Mr. Malone: No.

Mr. Johnson: Nothing more adverse than what he said.

Mr. Dunleavy: That is like playing charades.

Mr. Johnson: You understand what we are getting at, I think that our action was based on disclosures made by Mr. Schware himself.

[fol. 17] Mr. Dunleavy: I understand quite well. Of course, I accepted the refusal of the Committee to allow me to see all the information upon which they may have based their opinion and I accept as to the matter of principle. I presume then at this point you will want me to proceed.

Mr. Johnson: Yes.

Mr. Dunleavy: Before proceeding with the tender of any proof in this case, I want to point out to the Committee first of all that I have probably as difficult a job as there is to prove because I have to prove that a man is a person of good moral character and the only way you can prove it, I suppose, is to prove that he is a person not of bad moral character. There is no specific accusation so we must use whatever facilities and techniques we can to prove that he is a person of good character. I have to approach it in a rather unorthodox way and one of the first things I have been — leave to do is to introduce in this record, as a result, letters which a husband wrote to his wife while he was in the United States here and while he was in the South Pacific. I do that somewhat over the protest of my clients who know there is something disgraceful about our reading letters into a public record, the letters that a man may write to his wife but in view of the seriousness of the situation and seriousness of the principles involved, I am going to have to do that and I trust that you realize that this is being done over the protests of my clients and accept my judgment in this matter.

[fol. 18] MRS. RUDOLPH SCHWARE, a witness of lawful age, having first been duly sworn, upon her oath, testified as follows:

Direct examination.

By Mr. Dunleavy:

Q. What is your name?

A. Mrs. Rudolph Schware.

Q. Where do you live?

A. 1221 Truman Southeast, Albuquerque.

Q. You are the wife of Rudolph Schware, the applicant, for admission to the Bar Examination?

A. Yes.

Q. When did you marry him?

A. April 13, 1944.

Q. Where did you marry him?

Q. We were married at Camp Polk, Louisiana.

Q. In a civil ceremony?

A. Yes, by a Presbyterian Chaplain.

Q. Were you married again subsequently?

A. Yes, we got married by a Rabbi when he came back from overseas.

Q. During the period of your courtship did Mr. Schwere at any time ever influence you in any of your political ideas?

A. No.

Q. Was there ever any discussion of these rights of government?

A. No.

Q. Did you know when you married him that he was a Communist or had been a Communist?

A. No.

Q. When did you first learn that?

A. Well, in the—in corresponding with one another I found out.

[fol. 19] Q. When was he released from military service?

A. I think it was February of '48.

Mr. Schwere: '46.

Mr. Dunleavy: You weren't even close. Since that time you have lived together constantly as man and wife?

A. Yes.

A. During that time has he attempted in any way to influence you in your political thinking?

A. No.

Q. Have you ever heard him espouse any idea advocating the overthrow of the government, for example?

A. No.

Q. Do you belong to any political party?

A. No.

Q. You a registered voter?

A. Yes, Democrat.

Q. During the course of your—when he was away did he correspond with you?

A. Yes, constantly.

(Applicant's Exhibit No. 1, marked for identification.)

Q. I show you what has been marked as the Applicant's Exhibit No. 1 and ask you what that is.

A. It is a letter that he sent me from Camp Polk, Louisiana, when I was living in Dallas.

Q. And this is in his handwriting?

A. Yes, sir.

Q. Mrs. Schware, would you be good enough to read this letter.

A. Thursday March 16th—(Witness reads letter.)

Mr. Johnson: (to reporter) You need not take this.

Mr. Dunleavy: In there, Mrs. Schware, what did you mean by the term "traveler"?

[fol. 20] A. Well I had no family, I was raised in an orphan's home and I had nobody to account to and I would work in a city and work there for several years and decide I'd like to see another part of the country and just take off for that part of the country.

Q. You didn't use the term when you'd written to him in any political sense, did you?

A. No.

Q. You were sort of a tourist?

A. At that time.

(Applicant's Exhibit No. 2, marked for identification.)

Q. I show you what has been marked as the Applicant's Exhibit No. 2 and ask you what that is.

A. It is a letter that I received from him when I was still living in Dallas after we were married.

Q. What is the date of the letter?

A. May 1, 1944.

Q. Would you please read the letter—where was he at that time if you remember.

A. I believe he was still at Camp Polk.

Q. Calling your attention to the envelope is the postmark San Francisco, California, does that indicate anything?

A. Well, he was en route then overseas.

Q. Would you please read the letter, Mrs. Schware.

A. May 1—(Witness reads letter.)

(Applicant's Exhibit No. 3, marked for identification.)

Q. I show you what has been marked as Applicant's Exhibit No. 3, and ask you what that is.

A: It is a letter that I received while he was overseas, [fol. 21] dated May 9th.

Q. What year?

A. 1944.

Q. Would you please read that letter.

(Witness reads letter.)

(Applicant's Exhibits Nos. 4, 5, 6, 7, 8, and 9, marked for identification.)

Q. The original of those, now Mrs. Schware, each of those which are marked 4, 5, 6, 7, 8, and 9, are letters that you received from your husband when he was overseas, is that right?

A. Yes, they are.

Q. Since it bothers her to read these I will ask your permission to read them, introduce them into the record.

(Letters read by Mr. Dunleavy.)

I would like to introduce them into the record. That is all. Are there any questions that the Committee would like to ask this woman?

Mr. Johnson: I don't think so.

Mr. White: No.

(Witness excused.)

Mr. Dunleavy: Would you take the stand, please.

RUDOLPH SCHWARE, a witness of lawful age, having first been duly sworn, upon his oath, testified as follows:

Direct examination.

By Mr. Dunleavy:

Q. What is your name?

A. Rudolph Schware.

Q. You are the applicant here for admission to take the Bar Exam?

A. I am.

[fol. 22] Q. These letters that have been read into the record here are letters which you addressed to your wife during the time that you were in the military service?

A. They are—over my protest.

A. In there, for example, in one of the letters you mention the fact that you read to Samson, who was Samson?

A. Well, he was a young kid who was about eighteen or twenty years old and as I recall, I believe he was a Baptist, and he couldn't read very well, but the Bible was his world. Nobody else would read the Bible to him so I did.

Q. And that was a nightly occurrence?

A. That was a nightly occurrence.

Q. And he was a member of the paratroop company that you were in?

A. Yes.

Q. Where were you born?

A. I was born in New York City in 1914, Lower East Side.

Q. What type of neighborhood is that?

A. Well, New York City was—well, it was what we would, like the slum areas today. My father was a needle trades worker and we had six kids in the family and you see, my father never earned too much money and my father was—had been an old Socialist, was a member of the Socialist party, in politics, Socialism and trade unionism was something that was in the family all the time and in the neighborhood wherever we lived. We finally managed to—when the Amalgamated Clothing Workers opened up the cooperative apartments in the Bronx, my father convinced that as a golden opportunity to get the kids out into some fresh air. We were close to parks and of course it was buildings were put up by the Amalgamated Clothing Workers Union and we lived right next door to Sidney Hillman, who was President of the Amalgamated Clothing Workers Union and as a child I was in and out of his house all the time. A question of socialism, of trades unionism was something that we were always, always was being discussed.

Q. Was a part of your life?

A. Yes.

Q. The area in which you lived was an area occupied mostly by immigrants, was it not?

A. In the main.

Q. Are you familiar with the political history and economic history of the United States?

A. To a certain extent.

Q. During the period from approximately 1910 to about 1930, the great dissident forces in the United States were the socialist, were they not?

A. Yes.

Q. The Socialists ideas in the United States came possibly from Europe—was your father an immigrant.

A. Yes, he was.

Q. Was there a constant discussion among these immigrants in the slum area of the validity of these various political ideas such as Socialism?

A. Yes.

Q. And there were large groups belonged to the Socialist party?

A. Quite a number.

Q. And that was the environment in which you grew up; is that correct?

A. That is correct.

[fol. 24] Q. When did you commence work?

A. When I was approximately nine years old.

Q. Were you going to school then?

A. Yes, I was going to school.

Q. What kind of work did you do?

A. So far back, I know I helped a milkman and I used to have to get up about three thirty in the morning and help deliver milk until the route was finished and then go to school. I can remember working in a fruit market delivering orders and working in a store waiting on people, working after school from three thirty to about eleven, working all day Saturdays and Sundays and then I got a job at Columbia University in the Library, which was actually the first decent job I had ever been able to obtain and it was the time of depression and one day or it happened in the period of a few weeks, I was working part time and the part time workers were laid off and people who worked full time took our places.

Q. Between the time that you—were you a graduate of a high school then?

A. Yes.

Q. Between the time that you say you were attending grade school and working part time delivering milk at

three thirty in the morning, was it necessary all during the time that you attended school to continue working in order that the family might exist?

A. Well, if the kids didn't work we couldn't eat, we had to give all our ear-ings into the—into our mother, very seldom that anything was left for ourselves. It was quite an event when we'd have a nickel or a dime for ourselves. [fol. 25] Q. When did you first join the Communist party?

A. Well, I joined the Young Communist League before I joined the Communist party, that was in 1932.

Q. Will you tell the Committee the circumstances.

A. Well, I was going to High School and a fellow I was playing handball with during school hours when we used to get an hour off told me that he had written a letter to the school newspaper dealing with the question of unemployment in the United States, that the editors of the school paper wanted to publish it but that the faculty adviser refused to allow it to be published and he said that there was a club on the campus which dealt with problems such as that and asked me to attend one of the meetings. Well, I attended one of the meetings of the club and I found out that what he'd told me was true. I thought that freedom of the press was important, I was approximately eighteen years old at the time, and I attended meetings of the club whenever I could, which wasn't too often. The club ran candidates in the school elections. This was just prior to my graduation and they had a—the platform called for lower prices in the school lunch room and stuff like that and our candidates won the election.

It was after the election that the principal called all the members of the club into his office and our faculty adviser and told us that because of the way that the campaign had been conducted that we would have to disband the club. Now I know that right after we won the election they lowered the price of a glass of milk in the school lunch rooms from five cents to three cents and other foods correspondingly.

[fol. 26] There were a number of people who belonged to the club who belonged to various political organizations, the main ones were the Young Peoples Socialist League,

that had about approximately eight or nine members and there were four who belonged to the Young Communist League. To my dying day I will never forget, we were in the principal's office and the principal says, you either—you have to disband the club or else stand suspended. And the leader of the Young Peoples Socialist League got up and he said, "Seeing as how you put it that way, I acquess." I never knew what that word meant until I looked it up. He meant to say, "I acquiesce".

There were five people who refused to disband. Four of them were members of the Young Communist League, and myself, I thought it was wrong for the club to have to disband and it set me to thinking—I'd been raised in the socialist atmosphere—why was it when a test came, you've got to realize I was eighteen years at the time—when the test came why was it that the socialists had backed down and the Communists had stood up and I thought and thought and finally my—over the objections of my family—an invitation was given to me to join the Young Communist League and I joined the Young Communist League. It was a few years later that I joined the Communist party.

Q. This idea of joining the Communist League was first of all your own brainstorm, shall we say?

A. Yes.

Q. And none of the other members of your family are members?

[fol. 27] A. No.

Q. And I gather—

Q. Well, it is possible that my father at one time or other had joined the Communist party, I know my sister had.

Q. This was later.

A. Yes, but they have all left.

Q. During the period from 1934 when you say that you joined the Communist party, where did you reside in the United States?

A. Well, I worked in Monticello, New York, in a hotel driving as their chauffeur and then when the work slacked—when the hotel closed down for the summer season, on the way into New York there is a town called Gloversville and had a large Italian population and practically all the

people working in the factory there were Italiaps and in order to get a job to earn a living I changed my name from a Jewish to an Italian name and kept the same first name and was able to get a job.

Q. Is it a fact that in a community such as that is entirely Italian?

A. Well, I wouldn't say the community was entirely.

Q. I mean a substantial number of those working?

A. Yes.

Q. A Jew would have considerable difficulty in getting appointed—getting work?

A. In those days, yes, sir.

Q. Without being personal or without intending to offend you, but you have a somewhat swarthy complexion and could pass for an Italian?

A. Yes.

[fol. 28] Q. Was that the first time that you ever used an alias?

A. Yes.

Q. Was the sole purpose for that to gain employment?

A. Yes.

Q. Did you have any intention to deceive your employer in any way?

A. No.

Q. You did it then solely to earn a living?

A. Yes.

Q. And you rendered the work?

A. That is correct.

Q. Regardless of what name you used?

A. That is right.

Q. Did you ever again use the—what name did you use there, if you remember?

A. Rudy DiCaprio.

Q. After you left Gb-versville, did you continue to use that name?

A. Yes, I subsequently went to California looking for work and finally got a job in the shipyards in San Pedro, California, and I used the name Rudy DiCaprio there, too.

Q. Why did you use the name in the shipyard?

A. The same reason, I don't know of any and I never did find any Jewish person who is working in the shipyard.

Q. Was the use of the name solely to obtain employment?

A. Yes.

Q. Was there any intention to deceive anyone?

A. No.

Q. Did you obtain any financial benefit in the use of that name?

[fol. 29] A. Not other than being able to work and earn a living to a certain extent.

Q. Did you ever on any other occasion use an alias?

A. Yes, a number of times, I believe it was two. I have tried to check with the Los Angeles Police Department and made a trip to California purposely to get the information, because the information was refused to be supplied to me by mail, to find out how many times I'd been arrested in San Pedro, California. I know definitely that I was arrested twice and this was in the course of a strike and while I was in San Pedro I went through the files of the San Pedro Newspaper and found that there were approximately two to 3,000 people arrested in the course of about 66 days, approximately, over 200 on a charge of suspicion of criminal syndicalism.

(Discussion off the record.)

Q. You were speaking about the arrest of approximately two or 3,000 people during the strikes at San Pedro, California, were you arrested at that time?

A. Yes, I—to the best—

Q. First let's stay with the name, what name were you working under in the shipyard?

A. Rudy DiCaprio.

Q. And how many times were you arrested during the course of that strike?

A. To the best of my knowledge and belief twice.

Q. At that time it was—

A. Criminal syndicalism.

Q. Is that a state or federal?

A. State.

[fol. 30] Q. What is criminal syndicalism, if you know?

A. Well, there is a statute which defines criminal syndicalism as a person—as the commission of an act in which

somebody attempts to overthrow or subvert the state government, essentially that is what it is.

Q. Were you ever tried on this charge?

A. No, I was never tried on the charge.

Q. Were the charges dismissed?

A. I assume so, I was never brought before a judge, I was kept in jail, I remember one time 72 hours and then released and the second time I remember I was in jail approximately five days and read in the paper on the 3rd day that I'd been released but that I was still in jail but I'd never been brought before a judge and was released.

Q. And now sticking with the use of names, you have testified that you used the name of DiCaprio at Gloversville, New York, and at San Pedro, did you use any other alias at any time up until 1940?

A. Well, as I said, when I was arrested I used the alias of Joe Fiori.

Q. Was that in connection with employment or just a name that you assumed to give to the police?

A. A name that I assumed to give to the police, I suppose, it is a long time ago, I suppose I thought, well, if the company knew that I'd been arrested it was possible that I wouldn't be able to go back to work.

[fol. 31] Q. Where was no question of your identity with the police since they had you in person?

A. No, no.

Q. They had you regardless of what your name was?

A. That is correct.

Q. And did you obtain any monetary benefit as a result of that name?

A. None whatsoever.

Q. You have spoken about arrests, you testified to the arrest for criminal syndicalism twice in San Pedro, California, were you ever arrested on any other occasion?

A. Yes, I was arrested in 1940.

Q. Where?

A. In Detroit, Michigan.

Q. And what was the charge?

A. Well, I have attempted to obtain a copy of the indictment and the order of release and I corresponded with an attorney in Detroit, who defended me at that particular

time and so far he has not sent down the copy of the indictment or the order of release although I believe he has kept my check which I tendered to him.

Mr. White: Did you plead guilty to the indictment or not guilty?

A. I pleaded not guilty. I believe the charge was—

Mr. White: It was read to you, wasn't it?

A. I believe it was a violation of the neutrality act, it was the statute, I believe, of June 2, 1818, violation of the neutrality act.

[fol. 32] Mr. Dumeau: Was that, as a result of attempts that you had made, and you describe in one of your letters, of obtaining recruits for the fight against Franco in Spain?

A. Yes.

Q. Were you ever brought to trial?

A. No, we were not brought to trial. Ten days after our arrest, my arrest the indictment was not processed. I believe the Attorney General of the United States said that inasmuch as the case had not been brought to trial when it was fresh and inasmuch as the Spanish government had granted amnesty to quite a number of people who had participated, in the country itself, that there was no reason for pressing charges and I was released.

Q. Were you ever arrested again or at any other time?

A. I was arrested on one other occasion.

Mr. Malone: May I interpose a question there or would you prefer that we wait until you get through? I want to inquire whether or not you knew at that time that you were engaged in these recruiting activities that there was any question as to their legality?

A. No, I had no knowledge whatever that I was violating a law. There was no knowledge whatsoever.

Q. Was the recruiting being conducted openly or surreptitiously?

A. Quite openly. Everybody knew that I, myself, and the people in my organization and in the surroundings that I was traveling in at that time, everybody knew, for [fol. 33] instance, that I, myself, had volunteered to go to

Spain but I had no knowledge whatsoever that I was breaking any law. Of course, I had read history and known of during the American Revolution people coming over from Europe to help our fight here, before we became a nation.

Mr. Dunleavy: Anything else?

Mr. Malone: No, thank you.

Mr. Dunleavy: Going back, when was the other occasion or occasions when you were arrested?

A. Well, it was subsequent to the time that I had left the Communist party.

Q. When did you leave the Communist party?

A. In 1940.

Q. Well, let's go on with the arrests first, when was the arrest if you remember?

A. I can't remember the exact date, I do not even remember the town that it happened in. After I left the Communist party I finally got a job, I would transport cars and then a friend in California, I believe it was, knew that I was in Detroit and that he had had a car wrecked some place, somebody was bringing it out and asked me if I would take the car out there. Well, it was wintertime, I know that, and I took the Southern route and I was stopped in this town while I came out from eating my lunch and the policeman was there and asked, are you driving this car. I had all the papers on my person showing that I was authorized to drive the car for the owner and I was taken to the jail. They wouldn't let me send a wire [fol. 34] to the owner but then after they kept me in jail, I can't remember exactly how long I was there, it may have been two days, it may have been three days, I was released and let go and given back all my possessions.

Q. What town was this, if you remember.

A. I can't remember the town. It was some town in Texas.

Q. But no charges were ever preferred against you?

A. No.

Q. Were you ever arrested on any other occasion?

A. I received one traffic ticket here.

Q. In connection with the arrests?

A. But I wasn't arrested.

Q. In connection with your arrests at San Pedro and at Detroit, at that time you were a member of the Communist party, were you not?

A. Yes.

Q. And your actions were governed largely by instructions which you received?

A. That is correct.

Q. You say you left the Communist party in 1940. Would you tell the Committee in your own words the reason why you left.

A. Well, I'd left the Communist party once before in 1937, I believe, when my father died. I left California and went back home to New York. I dropped out of the Communist party then and that was the time when I assumed my rightful name and said to myself, why are you ashamed to be known as Rudolph Schware, the son of your father. Well, work was almost impossible to be had in New York City at that time and I traveled, I know I went to Chicago [fol. 35] and worked for a short time there and then I went down hitch-hiking all the time, looking for a job. I know I worked in Texas in a packing shed, working for approximately twenty cents an hour, ten hours a day, trying to save enough money to be able to go back north. I know I worked in Indianapolis, outside of Indianapolis picking corn. I was traveling looking for work and finally ended up in Detroit. I was single at the time and the relief that the City of Detroit gave for single men was this place called Fisher Lodge, approximately 2,000, 3,000 people, and food was about as much as the city could afford at that time and I was instrumental in helping to organize an organization in this lodge so that we could get better food and perhaps able to get jobs as a result of that.

It was subsequent to that that I was approached once again by the Communist party to rejoin and I did but my disillusionment had been going on and then you had in 1939, I believe it was, you had your Stalin-Hitler pact which began to raise a lot of questions in my mind and then in 1940 I began to see. At that time I was the State Secretary of the Michigan Workers Alliance and I began to see that the Communist party wasn't interested so much, those beautiful words wasn't so much that but a struggle

for power on the part of a few individuals that they wanted the power and they didn't care what happened to the other people. Of course, I was a lot older then, I was a lot older then, too, and I'd been questioning and questioning for quite some time and finally I made the events reach the stage where the party organization was trying to say how the organization of which I was the elected secretary should [fol. 36] be run, not for the benefit of the organization, that is when I reached the final decision, you and I part ways and I left.

Q. In other words, if I understand you correctly, Mr. Schwere, what you are saying is that you found that the Communist party had no interest in individuals or principles, it was simply a power?

A. They were using you, they were using you. That was probably one of the reasons subsequently when I was living in South Bend, where I finally managed to get a job, that I on one occasion or a couple of occasions, went up to the FBI and asked them, told them who I was and they checked and asked them if I could be of service and they never sought to use my services.

Q. You volunteered your services to them?

A. That is correct, that is correct.

Q. And that was the extent of your opposition to Communism?

A. That is correct at that time.

Q. Until after you returned to the military service?

A. Well—(no answer.)

Q. Mr. Schwere, in view of all the stories of who-dunits on radio and television, how does a person dissociate himself from Communism? It seems to me that it is common gossip that they keep a ten-acle on everyone.

Q. Well, all I can speak about is myself, I dropped out.

Q. Just quit?

A. I quit.

Q. That was in part of 1940?

[fol. 37] A. It was the latter part of 1940.

Q. Did you leave Detroit after you'd left the party?

A. Yes.

Q. Where did you go?

A. Well, as I said, I was driving cars, I was then driving

as a caravan driver, you tow one car behind you and go to California or if you are driving like we used to drive Willys out of Toledo, go down to Florida or Studebakers, driving them to Ohio and Missouri.

Q. Where were you living during that period, the time that you left Detroit, until you enlisted in the military service?

A. In South Bend, Indiana.

Q. Were you at any time, while you were in South Bend, prior to 1940 and your entering the military service, engaged in any way in participation with Communist activities?

A. None whatsoever.

Q. When did you go into the army?

A. In 1944, I believe, In January.

Mr. White: '34?

A. '44.

Mr. Dunleavy: '44?

A. '44, in January.

Q. Did you volunteer for the paratroopers?

A. Yes, I did.

Q. Where were you stationed?

A. Well, we were stationed in Toccoa, Georgia, and then in North Carolina, and from North Carolina we went to Louisiana, Camp Polk, and from there we went to San [fol. 38]. Francisco, and from San Francisco we went to New Guinea.

Mr. White: Were you drafted?

A. Yes, I was drafted.

Mr. Dunleavy: But you volunteered for paratrooper service?

A. That is correct.

Q. How long did you spend in New Guinea?

A. It was a short period of time, three or four, three months, I became sick.

Q. What was the sickness?

A. Well, I had malaria and I still carry the scars. I had

what they call jungle rot, I had it all over my body and I had sinus, my sinus started to bother me.

Q. You receive compensation from the government for this jungle rot malaria?

A. No, I receive it for sinusitis.

Q. Acquired in the South Pacific?

A. That is correct.

Q. In certain of these letters which you have read into evidence, there you express certain opinions about, for example, the importance of Roosevelt's FEPC legislation, are you familiar with what I am referring to?

A. Yes.

Q. Those principles in there are ones that you still believe in?

A. Yes.

Q. You believe that this can be made a better world to live in?

A. Yes.

[fol. 39] Q. Without the help of the Communists?

A. Absolutely.

Q. Those are expressions of principles which you firmly believe in?

A. That is correct.

Q. After your discharge from the army where did you live?

A. In South Bend, Indiana.

Q. How long did you live in South Bend?

A. From 1946 to 1950.

Mr. Malone: If you will excuse me, I hate to interrupt again, but I wanted to inquire whether you have any additional witnesses and the Chairman what the plans of the Board are. Our plane leaves at five after five.

Mr. Dunleavy: We have additional witnesses.

Mr. Malone: I will stay over tonight and go down in the morning.

Mr. Dunleavy: What kind of work did you do in South Bend?

A. Well, I drove a truck which was the job that I had prior to going in.

Q. No, I mean after you got out.

A. Well, I drove for a few months. I went back to the

job that I had prior to getting into the service and then I went into business for myself selling Venetian blinds and at that time in South Bend, at the start, I was selling scrap plywood, Masonite, and continued that until we decided that I should go to school and I was—started school at Western Michigan and then came down to law school here and sold Venetian blinds all the time in order to take care [fol. 40] of a growing family.

Q. You kept the—you attended school and ran this Venetian blind business in South Bend until you moved out here?

A. Yes.

Q. When did you come out here?

A. In 1950.

Q. And did you enroll in the university at that time?

A. Yes, I did.

Q. In the law school?

A. In the law school.

Q. You enrolled in the university law school in September of 1950?

A. That is correct.

Q. Did you go into business here at the same time?

A. Yes.

Q. What business?

A. Selling Venetian blinds.

Q. Substantially the same business you were in in South Bend?

A. That is correct.

Q. Did you at the time that you enrolled or shortly thereafter, discuss your past background with any one in the law school?

A. It was approximately the second or third week that I was in law school that I made a full disclosure to Dean Gausewitz of my entire past background and the Dean, I believe, advised me at that time not to say to anybody about the fact that I had been a member of the Communist party, not to say anything about it and I haven't, I didn't.

Q. Did he raise any objection to your attending the school?

A. None that I know of.

[fol. 41] Q. You were allowed to continue?

A. I was allowed to continue and I am graduated.

Q. Are you still in the Venetian blind business?

A. No, I don't have any ads—I always had just a small ad in the classified directory and last August I was in an automobile accident and hurt my back and then subsequently I received a notification that I could take the Bar and I believe that was about the same time they were asking for ads for the new book and I was so confident, inasmuch as I could take the Bar, that I could pass it, that I discontinued the ads and they have been discontinued ever since.

Q. How are you presently earning a living?

A. Well, I work part time for Eckert's installing traverse rods for them. I looked for, I went around looking for a job, figuring that I could use the law training as an adjustor for an automobile company—it seems that most of them you have to start off, you have to be about 25 or 30 years old and a man 40 years old is too old. I am also at the present time in the part time business agent for the Linoleum Layers Union.

Q. It is a sort of a living at the present time—living at the present time is sort of a catch as catch can affair?

A. Correct.

Q. How many children do you have?

A. Two.

Q. In your letters that have been read in evidence here you speak of being an atheist, are you an atheist?

A. No, I am a firm believer in God.

Q. You belong to any religious group?

[fol. 42] A. Yes, to the Congregation B'Nai Israel, I belong.

Q. That is the synagogue here in Albuquerque?

A. Yes. I belong to the synagogue in South Bend, Indiana.

Q. You mentioned that you were, on your discharge from the service, you were being married again in the Jewish faith in New York City, is that correct?

A. That is correct.

Q. When did you cease to be an atheist?

A. I was on my death bed.

Q. Where was that?

A. In New Guinea.

Q. And then—

A. I don't know, it changed.

Q. You don't think reading the Bible to this Baptist may have changed you, do you?

A. No, I wouldn't say that.

Q. But in any event any member of your—is your wife a member of the Congregation B'Nai Israel?

A. Yes.

Q. Your children participate?

A. Well, my son, of course, he is just two and a half years old but when he was born we had what is called the "Brist", which is a very religious ceremony, saying that he is now entering the House of God.

Q. That is the feast of the circumcision, is it not, the same as they have in Catholicism?

A. That is correct and my daughter attends Sunday school, she is six years old.

Q. All of these things were done prior to any question as to your qualifications to take the Bar Examination?

[fol. 43] A. That is correct. We attend services.

Q. Are you familiar with a particular anonymous scholarship fund in the law school at the University of New Mexico?

A. Over my protest, yes.

Q. I wish the Committee to understand that I am asking him to disclose this against his better judgment, will you tell what that scholarship is.

A. It is a small anonymous scholarship for indigent law school students which I have set up at the University of New Mexico Law School.

Q. When did you first start it?

A. I believe it was in 1950.

Q. How much do you pay into it?

A. It is a small one \$50.00 a year.

Q. Are there instructions to the Dean of the Law School that that money is to be used for the assistance of any of the law students?

A. It is to be left to his discretion.

Q. Basically for financial assistance to indigents?

A. That is correct.

Q. And have you paid it for the last four years?

A. I absolutely have and will pay it until I die.

Q. As long as you are financially able?

A. I will always be financially able, I hope.

Q. To contribute the \$50.00?

A. That is correct.

Q. In connection with this hearing here, have you attempted to get letters of recommendation from various persons?

[fol. 44] A. Yes.

Q. Have you been able to get letters of recommendation from every single student in your class?

A. No, not every single student in my class.

Q. How many were you unable to get one from?

A. Well, there are a number who have left Albuquerque.

Q. All those in this vicinity who are here?

A. Well, with the exception of two. One is a member of the Bar and she said she would give me a letter and I haven't been able to get ahold of her since, Miss Streeter, and the other is Charles Chavez.

Q. And has he refused you one?

A. Yes, he refused.

Q. But every other student has given you one of these letters?

A. Yes.

Q. This is the summer session up at the University, how many of the professors in the law school are still up there?

A. There are four, I believe.

Q. Were you able to get letters of recommendation from each of them?

A. Yes, I was.

Q. And they are—I don't want to read them in the record, I'd like to introduce them as a group, various people with whom he'd had dealings and to simplify it I will say that they are Professors Clark, Bauman and Poldervaart, and each of the students with the exception of one, Chavez, has recommended Mr. Schware as a person of high moral character.

[fol. 45] We have no further questions.

(Applicant's Exhibit No. 10, fifteen pages, marked for identification.)

Mr. White: May I ask a question?

Mr. Johnson: Yes, members of the Board will now be permitted to ask any question they wish. We will start with you, Mr. White, any you may have.

Cross-examination.

By Mr. White:

Q. Mr. Schware, will you again state your reasons as to why you quit the communist party in 1940.

A. Well, for a period of time I'd been having serious doubts in my mind as to my course of conduct and my activities in behalf of the Communist party. The first big doubt came with the signing of the Stalin-Hitler pact but I was able to gloss over that. It was in the following year that the realization finally dawned on me that the Communist party, that the words were fine but actually the activities that they did and were carrying on weren't so good.

Q. In other words, those officers who were at the head of it were using it for their own personal gain as against—

A. (Interrupting) It was that they wanted the power. They wanted the power and this is their opportunity and this is the way they were going to get it.

Mr. Dunleavy: You mean agitating?

A. That is correct.

Mr. White: Have you engaged in the practice of law at all?

A. Engaged in the practice of law?

[fol. 46] Q. Yes.

A. Not to my knowledge.

Q. Will you state to the Committee, what, if any, activities you have carried on before any labor body hearings at Los Alamos.

A. I was asked by the Retail Clerks Union, of which I am a member, to participate in some hearings being held in Los Alamos.

Q. And what was the nature of those hearings?

A. The nature of those hearings—an unfair labor charges practice hearing, conducted by the National Labor Relations Board.

Q. And did you appear before the Board?

A. I was there at the hearings.

Q. And when was that?

A. That was last summer.

Cross-examination.

By Mr. Andrews:

Q. I believe you testified on Direct Examination that the only reason you adopted and used an alias was in order to secure employment?

A. That is correct.

Q. Didn't you tell the Committee in Santa Fe that you'd adopted that name because you were working amongst Italians and it made it easier to recruit them into the labor union that you were then working for?

A. Well, it is part of getting a job and to better conditions on the job, it would be easier to do so.

Q. Well, did your employer, the union that employed you at that time know that you were not Italian?

A. There was no union.

Q. Weren't you working as a union organizer at that time?

[fol. 47] A. No.

Q. Didn't you tell us that in Santa Fe?

A. Not to my recollection.

Q. What were you recruiting?

A. There was a union organized after I went to work there and when I think back I never got such a calling down in my life as after that—the union was organized, I brought them into the American Federation of Labor, we went to the Central Labor Union and received a charter from the American Federation of Labor. At that time there was what is known as the Trades Union Unity League, which was run and controlled by the Communist party and I was really laced because after organizing these people I brought them into the American Federation of Labor instead of the Trades Union Unity League.

Q. Well, let's see if I have this straight, now I understood in Santa Fe that you told us that you had adopted this alias so that you could recruit these Italian people to come into the union, is that correct?

A. Yes.

Q. Though you weren't employed by the union?

A. No, no, there was no union, I was looking for a job and this was the place where I could get a job and at the

same time I could organize if I could get the job. At the same time I could organize them into a union.

Q. Which was the motive in using the alias, was it to get the job or was it so that you could get those Italian workers organized?

A. I'd say a combination of both.

Q. So then that you would add to what you stated on [fol. 48] direct examination?

A. That is correct.

Q. What was the motivating force behind your activities in recruiting for the Abraham Lincoln Brigade?

A. Well, I believed that the government of Spain, the Loyalist government needed help and I, myself, had volunteered to help and also I, as a part of that volunteering, attempted to get as many of the people as I knew as possible to come along with me.

Q. And that was part of your activity as part of the Communist party, is that correct?

A. That is right.

Q. And you were going to go over there and risk your life in that cause, is that correct?

A. That is correct.

Q. and when was that now?

A. That was in 1937.

Q. 1937?

A. No, '37 or '38, I wouldn't—the years escape me there.

Mr. Andrews: That is all.

~~Cross examination.~~

By Mr. Malone:

Q. Mr. Schwere, during the period from the beginning of the war in 1941 and until you were drafted in 1944, where were you employed?

A. I was employed, I worked for myself for a while, I was employed for a long time, and then I had these jobs driving cars and finally they stopped making cars, I remember I worked for Caravans, out of South Bend, which is a tow-bar company and then they stopped making Stude-

bakers and I belonged to the Teamsters Union there, in [fol. 49] order to drive the cars, they came under the Teamsters, and went to work for a few trucking companies for short periods of time, very short periods of time and finally ended up working for Fitterling Transportation Company.

Q. Is that in South Bend?

A. In South Bend.

Q. When was it that you worked in the shipyards?

A. The shipyards I worked in was in California, San Pedro.

A. And in what year was that?

A. I started in 1934, I believe, Mr. Malone, and I don't recall right at the moment exactly how long I worked there in the shipyards.

Q. You were single, until you were married during the war, were you?

A. Yes, sir.

Q. Did you obtain any draft deferments during the period from '41 to '44 by reason of your occupation?

A. Not to my knowledge.

Q. You think you just hadn't been called up during that period?

A. That is correct.

Q. Have you had any contact with the Communist party or with any individuals who are members of the Communist party since 1940, when you left them in Detroit?

A. Probably, but I don't ask people what their political affiliations are.

Q. I should have said whom you knew to be members of the Communist party?

A. Well, I know of right here in Albuquerque, there is one person I suspect is a member of the Communist party, [fol. 50] I couldn't prove it.

Q. What has your relationship with him been?

A. Well, this particular person purchases some traverse rods from me and started as a business relationship and you get to talking. I still consider myself a liberal person and I don't think it is a crime and occasionally I will go out and buy Communist literature to see what they are saying. I think a person should keep informed. At the same

time, I also, when I can get it I read the reports of the House UnAmerican Activities Committee. I think a person should keep himself informed as to what is going on in the world.

Q. How frequently would you say that you have purchased Communist literature for that purpose?

A. Not too often, not too often.

Q. In the last year, for example, how many times?

A. Well, probably four or five.

Q. But your interest in it was limited entirely to the basis that you stated?

A. That is correct.

Q. On an interest in learning what their present activities were?

A. That is correct.

Q. Do you feel in the use of aliases in the circumstances that you have testified to, you were resorting to a subterfuge of any kind or did you feel that you were justified because of the end to be accomplished?

A. Well, the end to be accomplished was to get work. I mean it wasn't the question of trying to deceive for a gain [fol. 51] outside of being able to work, to live.

Q. On the occasion of your previous hearing, I stated to you and I want to re-state that, that aspect of the thing gives me a great deal of concern because I feel that a lawyer is tempted daily by reason of expediency of personal gain or for some other reason, to resort to subterfuges and do things that no one else is going to know that he's done and a man who has demonstrated that his *conscious* will permit him to do that raises a question in my mind as to what he would do when he is faced with other situations as a member of the Bar, which he might feel likewise justified the means which he might undertake to accomplish and if there is anything further that you can say concerning that, I would be glad to hear it because frankly it concerns me considerably.

A. Well, first of all, as I stated on the last time, I am a lot older than I was then, I know I am scrupulously honest, I know that. Where I am dealing with somebody else's money, I handle that better probably than my own. I have got a family and they are my main consideration in life.

As I stated when my father died and I went back to see my mother, I—the question raised itself with me, why are you ashamed of the fact that you are Mr. Schware instead of Mr. DiCaprio, and I have never used an alias since then and never will and don't intend to. I have no reason for it and if there was a reason I wouldn't.

Q. How old were you on the last occasion that you did that?

A. Well, I was born in 1914 and I started using one in 1934, that made me 20 years old and then it was when I was [fol. 52] probably 23 years old when I stopped.

Q. What name did you use in the Communist party?

Mr. Johnson: Where?

Mr. Malone: In the Communist party.

A. I probably used the same name that—it was either Rudy DiCaprio or Joe Fliori, one or the other.

Q. You don't recall now?

A. No.

Cross-examination.

By Mr. Houk:

Q. What was the occasion of your quitting the Communist party in 1937 for the first time?

A. My father had died, I was out in California and hadn't heard of his death until subsequent to that and my mother wanted me to come home. They'd always been violently opposed to my belonging to the Communist party and it was a period of bereavement and my mother was able to convince me that I was wrong. Well, then I stayed around New York and I believe I got a job helping on a truck that lasted a short period of time—yes, it was a company that was selling stoves and the job lasted a short period of time and then I took off. I went to Chicago and I worked there for a while and then I went—getting cold, so I figured, if I am going to starve I may as well starve where it is warm, so I went down to Texas and saved enough money to come back up north.

Q. I understood you to say, Mr. Schware, that your

fäther and your sister had at one time been members of [fol. 53] the Communist party?

A. That is correct.

Q. Well, now you say that he was violently opposed to it.

A. He was violently opposed.

Q. Well, why did he join an organization that he was violently opposed to?

A. My recollection—you remember I was a small boy—is that my father had joined the Communist, he'd been a Socialist all his life and he joined the Communist party sometime in the twenties and there was a strike in the needle trades union industry, in which my father—it was after that or during that strike that my father left the Communist party because of the tactics that they's pursued in the course of that strike and when I say my father was violently opposed I mean that he was violently opposed.

A. Is your sister older or younger than you are?

A. She is older than myself.

Q. Is she still a member of the Communist party?

A. My sister is a violent opponent of the Communist party.

Q. When did she leave the Communist party?

A. I don't know the exact year she left, it was probably 1939.

Q. About the same time that you left it?

A. Well, she left before I did.

Q. She joined it while your father was violently opposed to it, too?

[fol. 54] A. Yes, she'd left—all the children in the house at one time or another, we all left the house.

Q. How many children are there in your family?

A. There are four left today.

Q. Were they all members of the Communist party?

A. Just myself and my sister, I believe my young sister had joined the Young Communist League at one time and left and my brother never participated.

Q. So all of you joined in opposition to your father except one child?

A. That is right, well, no, my sister that died, I am positive never belonged. You see, the whole thing is, your've

got to take into consideration this home atmosphere, this background that we were raised in.

Q. What information did you voluntarily give to the FBI in South Bend, Indiana, about the Communist party?

A. Well, I know I spoke on a number of occasions to one of the agents there of the FBI and was up in their office.

Q. Have you ever contacted the FBI here?

A. No, I have not.

Q. Have they ever contacted you?

A. They contacted me on one occasion.

Q. You feel at liberty to tell us what that was?

A. Yes, I took a job to supply Venetian blinds for the Wherry Housing Project and I employed a certain fellow by the name of Chuck Albaugh and he asked me for a job and I gave him the job, the job came up just prior to my, [fol. 55] I was leaving on a vacation in California and an agent of the Federal Bureau of Investigation came by to ask me what I knew about this man.

Q. Nothing to do with your past membership in the Communist party?

A. No, no.

Q. Mr. Schwere, as I understood you, you said it was two or three weeks after you had enrolled in the law school that you confessed, so to speak, to Dean Gausewitz about your past activities. How come you to do it at that time?

A. I don't remember.

Mr. Johnson: I didn't get his answer.

A. I don't recall what the occasion was, all I knew is—Oh, excuse me a minute—I believe, now I am not positive, I believe the Dean had asked all the students to write a short life history and instead of writing a short life history I went in to see him. I couldn't swear to that but it is possible but I know that even if that hadn't been done that I would have told the Dean because I didn't want to travel under any false colors.

Mr. Houk: Before enrolling in the law school were you requested to report any subversive organizations you'd belonged to in the past before being enrolled?

A. Not to the best of my recollection.

Mr. Houk: That is all.

Cross-examination.

By Mr. Whatley:

Q. Mr. Schwere, I'd like to know, when was it that you determined to study law?

[fol. 56] A. My wife and I debated my going back to school after I'd come out of the service and in South Bend I was a member of the Jewish War Veterans and there are quite a number of attorneys in leading positions and I became friendly. We asked or we traveled in a circle of attorneys and doctors, medical men and business men, and I thought that I could—I finally decided, well, that I'd like to study law and since graduating from the law school and all the time that I have been in a law school although it was hard personally, I have enjoyed it more and more and I would like to make this my life's work and I know I have been taught enough and have enough respect for the profession that from me no harm would ever come to the name of the profession.

Q. Did you go to school after you were discharged from the army at any other place before you came here and entered law school?

A. I went to school at Western Michigan College.

Q. You'd finished high school before you went into the army?

A. That is correct.

Q. Had you taken any college work at all before you went into the army?

A. I took at City College of New York, I went for a very short period of time.

Q. Now in making your decision that you wanted to study law, did that come about as a result of discussions between you and your wife alone or did you discuss that with any of the lawyers with whom you were associated in this veterans organization that you speak of?

[fol. 57] A. I couldn't recall, I couldn't recall that, sir, I know that we entered school with the objective—lawyer.

Q. Were your father and mother religious people?

A. No, they were not.

Q. Were they atheists?

A. Yes.

Q. When, if you can recall, did you become an atheist or did you just grow up—

A. Just grew up, we never went to the synagogue, I mean. At the present time I don't know if my brother belongs but I know myself and my two sisters have all joined the synagogue.

Q. Now you were an atheist before you became interested in Communism, is that right?

A. That is correct, I always considered myself as one, in other words, I didn't believe in God.

Q. Yes.

A. And I do today.

Q. And what brought you to a realization of the fallacy of that kind of philosophy was this death bed experience that you had in New Guinea?

A. I was very, very sick, I was on the verge of death, according to what the doctors told me and that was, well, that is something that happens once to a person.

Q. Yes.

A. It happened to me and I want my children to grow up to be religious people.

Q. Before you discussed your background, your past, with Dean Gausewitz, did you mention the fact to anyone else and seek to obtain the advise of anyone else with respect to the advisability of making that disclosure to the Dean?

A. Not to my knowledge, sir.

Q. You did not discuss that with your wife?

A. Oh, probably with my wife.

Q. U-huh.

A. Yes, definitely because we discuss practically all things.

Q. Did it ever occur to you before you undertook to obtain this law school, this law education, did it ever occur to you that your experience and your membership in the Communist party and your activities in that organization would in any wise effect you in your ability to be admitted in the Bar?

A. Well, I'd classify that under the heading of a calculated risk. In other words, we knew that there was a possibility that I would not be permitted to take the exam. On the other hand, we also knew that these are things that took place when I was a young person and on that basis we were very much surprised when we received a letter saying that you can take the exam. I was expecting that you gentlemen will say that we have to hold a hearing on your case, Mr. Schware. Frankly that is what I expected.

Q. Well, you made no disclosure to this Board of Bar Examiners until after you had completed your law school, did you?

A. No place in the questionnaire that you submit and I submitted a brief, it was nine pages of information, nowhere does it call for this question, were you ever a Communist.

Q. But what I am trying to get at, Mr. Schware, is that you did not contact any member of the Board of Bar Examiners, nor did you make inquiry with regard to the [fol. 59] advisability of contacting the Board of Bar Examiners before you completed your law course, did you?

A. No, I had not.

Q. The first time you made or had any contact with the Board of Bar Examiners is when you made your application to—

A. That is correct.

Q. —to take the Bar examination?

A. Yes, but as I say, I'd told the Dean this and I'd asked him on a number of occasions and he expressed the opinion to me that there shouldn't be any difficulty.

Q. Now have you, in connection with any of these labor board organizations to which you have belonged, and some of which as I understand it you still belong to, have any of those organizations aided or assisted or abetted you in obtaining a legal education and being admitted to the Bar?

A. No.

Q. Have you any sort of a tentative or tacit understanding with any labor organization that if you are admitted to the Bar, you will assist organized labor?

A. Well, I wanted to specialize in labor law. Of course,

I mean when I speak of specializing in labor law, I am speaking in terms of while representing unions, if they would have me, speaking in terms of workmen's compensation and other things.

Q. You have that idea because you honestly believe in that movement?

A. I honestly believe that labor unions are good for the [fol. 60] country, that they can be of assistance in making this a better place to live.

Q. I wasn't present at the time in February when you had your hearing before and that is the reason that I was making these inquiries because I don't know anything about them. I just wanted to get that straightened out. That is all I have.

Cross-examination.

By Mr. Johnson:

Q. How did you happen to come to New Mexico?

A. Well, my daughter was very sick when we came here and we'd been told for my daughter and myself to go to a high dry climate. I wrote to the University of Arizona and they wrote back that they weren't accepting out of state applications. During the thirties I used to hitchhike back and forth between California and New York a number of times and I remembered Albuquerque as a hot dry—high dry climate and there was the University of New Mexico had a law school so we wrote to the law school here, that is how we happened to come to New Mexico.

Q. When you went in to see Dean Gausewitz you say you made a full disclosure to him about your past affiliations with the Communist party and so forth, is that right?

A. That is correct and he told me that it—he says, said you know, Mr. Schware, you are the first person that I have ever met that has ever admitted that he's been a member of the Communist party.

[fol. 61] Q. He raise any question about whether you'd be able to be admitted to the Bar on the basis of it or not?

A. None, none whatsoever.

Q. But I believe that he suggested that you not say anything about it?

A. That is correct, to the—in the school, I mean.

Q. He made no suggestion that you conceal from the Board of Bar Examiners—

A. (Interrupting) No, none whatsoever and if there had been a place on your application which asked that specific question I would have answered that question in the same manner that I answered every other question, making a full disclosure to the best of my knowledge.

Q. You having been a member of the Communist party and myself being quite ignorant of it and having, of course, heard certain things about it, I'd like to ask a question or two about the Communist party. Is it true or is it not true that a bona fide member of the Communist party recognizes only the Communistic authority as the authority to which he owes all allegiance, is that correct?

A. That is correct.

Q. As a Communist, in other words, a Communist who may be an American citizen but if he joins the Communist party, his loyalty and allegiance are to the heads of the Communist party in Russia, is that correct?

A. Well, I know when I was a member of the Communist party while we looked to Russia as the guiding star, still we considered ourselves American citizens and as a legal [fol. 62] political party. Does that answer your question?

Q. Not entirely. Let's say that I belonged to the Communist party and a directive of whatever nature it may be comes from Russia or at least where I understand is the source of words of wisdom and a certain directive comes out to a true member of the Communist party—

A. That is all.

Q. —am I under obligation, if I am a Communist, to obey that directive?

A. That is law and that is probably one of the reasons why the Communist party has been so much repudiated by the American people. We've got, just like myself, there have been hundreds of thousands of people who entered the Communist party's ranks and finally end up asking ourselves questions and starting to question, why, why, and then saying to heck with you.

Q. Well, to get back to this thought that the basic concept

of the Communist party is that they—it recognizes no nationalistic lines, that is, if you belong to the Communist party in the United States you are the same breed of cats as one who belonged to the Communist party in Argentina or whatever that may be?

A. That is correct.

Q. And the belief is that the Communist party as such should be *and* controlling factor in government, is that right?

A. That is the aim eventually.

Q. All right now, let's say that I am a member of the Communist party and I am residing in the United States and you are a member of the Communist party and you [fol. 63] are residing in Mexico. Say that a war should break out in which Russia, China, whatever countries might make the alignment, would be on the one side and the United States and other countries, including Mexico, would be opposed, and the directive would come out of Russia to me here and one to you down there to do whatever we could to aid the cause of Communistic forces that were at war with, what they would classify if Russia—

A. I have no doubt they would.

Q. —would issue that directive, if I am a true Communist and that directive would be to blow up the railroad tracks or something I would be advised to do it, it would be my duty.

Q. I said I have no doubt.

Q. All right, if I am a Communist I follow that directive, is that correct?

A. Yes.

Q. Now then, that leads me down to this question concerning yourself, you stated that you left the Communist party because of your having reached the conclusion that the aims of those in charge of the policies of the Communist party were personal advancement and what not, rather than a belief in the principles, basic principles of the Communist party. That to me still leaves a doubt in my mind as to whether or not you still believe in the basic principles of the Communist party so that if at some time, let me ask you this question, suppose that the ruler of Russia today were to be overthrown and to the eyes of the Communist, the control of the Communist party was re-

stored to sincere Communists, those that believe in principles of Communism, that condition existed, do you still believe in those principles to the extent that you would [fol. 64] again join the Communist party?

A. Never, never!

Q. And then you say that you are not only, while you may have left the party originally because you didn't believe that the leaders were sincere, you now say that you do not believe in the principles of Communism?

A. I am saying, Judge, that for myself I would never join the Communist party. I would never join the Communist party.

Q. You understand what I am trying to get out?

A. Yes, I see.

Q. As I see it, if you are a true Communist, and you believe that Communism knows no international boundary lines, it is a theory of the government of the workers and so forth. Therefore, if the Communist party were controlled by those that are for the workers, anybody who belongs to the Communist party cannot take an oath as an American citizen, which you have to do when you are admitted to the Bar, that you will uphold the constitution of the United States, you understand that?

A. Yes.

Q. And that is, is it not, entirely foreign to the basic conceptions of the Communist party, isn't that true?

A. No, if I took that oath I mean it, I'd take it in all sincerity, with no hesitation.

Q. I am not talking about that. I am talking about the mere fact that you take an oath to uphold the constitution of the United States, that is contrary to all principles of [fol. 65] Communism, is it not?

A. Yes, sir.

Q. To take that oath?

A. That is correct.

Q. Regardless of whether it is Malencoff or Stalin or the Twelve Apostles in charge of the Communist party, if you took that oath you cannot be a Communist, is that right?

A. I am not a Communist.

Q. No, I am talking generally. I mean, if I am a Communist I cannot take an oath to uphold the constitution of the United States, isn't that true; you honestly cannot do it.

A. That I can't, I couldn't answer that, Judge. I mean I couldn't answer that because they take the oath all the time.

Q. They do it dishonestly, don't they, when the Communists take the oath because if he is bound as a Communist to obey the directive out of Russia—

A. That is correct.

Q. —then he cannot honestly take the oath to uphold the Constitution of the United States, can he?

A. That is correct.

Q. So to me the question goes deeper, whether a man has withdrawn from the Communist party, it goes deeper down and as to why he has withdrawn, if you merely withdraw from the Communist party, because he didn't like what the leaders were doing. If you still believed in the basic principles of the Communist party, then you are not in a position, whether you are out of the party or actively in it, at the present time you are not in a position to take an oath to uphold the Constitution of the United States if [fol. 66] you have any feeling that that isn't right.

A. Judge—

Q. Do you understand what I am getting at? It is a little hard to explain.

A. I understand. Judge, have you ever read Carl Marx—

Q. I haven't.

A. —Communism manifesto—any way, I think that you will find in that manifesto or maybe, I believe it is in the manifesto, there are seven or eight principles laid down and if anybody studies that thing and studies it carefully, they will find that under the capitalistic government that we have in the United States, approximately five or six have already been fulfilled. The capitalism itself has been able to offer more to the American people than any other system has been able to, but still, even though we have—we are living in the best country in the world, we have highest standard of living, there is still certain inequities which can be changed under the capitalism. Do I make myself clear?

Mr. Whatley: Without resorting to Communism?

A. That is correct and are being changed every day.

Mr. Johnson: Well, that is not what is troubling me.

Under our American system of government we could become any kind of a nation so far as philosophy of government is concerned, providing people go to the polls and so vote it.

A. That is correct.

Q. That happens to be our system. We can change our system, I understand that, but take an oath to uphold our [fol. 67] Constitution, which means that we do it that way.

A. That is correct.

Q. And the communist concept is entirely different.

A. Yes.

Q. They start out, in the first place they recognize no, ostensibly they recognize no boundary lines. It is a class movement, basically it is a class movement.

A. It is an internationalist movement, too.

Q. And there your allegiance is to those that belong to this international class movement rather than to your own government or the country in which you are living.

A. I absolutely agree with you.

Q. And there is where I get back to the question of whether or not your explanation or your reason for withdrawing, is it based on a disbelief in the principles of Communism as opposed to Americanism or is it merely based on the dissatisfaction of the methods being used by certain leaders?

A. Well, originally—

Q. Well, let me add this, if it is merely based on the dissatisfaction with leaders you can still be Communistic at heart.

A. Leaders can change.

Q. That is what I want you to answer. All I want to know is what you want to do.

A. Judge, to get back to your question, I think that I can answer it in this way: Actually that the basic premise of [fol. 68] Communism that the state is all powerful and that the individual does not count. Second, a person, that religion is incompatible with being a Communist. As they put it years ago, religion is the opium of the people. I do not agree with the idea that the state is all powerful and that the individual does not count. I want to be able to raise my children the way I want them to be raised and

not the way somebody else would want them to be raised. I want my children to be religious people. Is that answering your question, Judge? I don't know any other way to do it.

Q. The reason I asked you those questions was because when I inquired why you withdrew you said that you withdrew because of the leadership. To me it went further than that.

A. Well, it went further than that. They were trying to dictate the policies of the organization which I belong to and incorrectly to the detriment of the individuals and actually it comes down to this: who counts, does an individual count.

Mr. Johnson: That answers my questions. Was that all the questions?

Mr. Malone: I think, just so the record will be clear, Mr. Chairman, we should get into it the circumstances under which this matter was discussed with the Supreme Court after a former hearing. I don't think there is any disagreement about it but I thought it might be well to state for the record and be sure that Mr. Schwere does concur that at the time of the former meeting when you appeared before the Board and the Board advised you of its action and the Chairman at that time stated to you that you would [fol. 69] have a right to take the matter to the Supreme Court and you stated at that time and I am not trying to bind you by it at all, I merely want it to be clear that the Board only went to the Supreme Court because it understood that you were not going to do that. You at that time said that you didn't expect to take any further action if the Board of Bar Examiners was adverse and then the Chairman stated that he would like to have the matter submitted to the Court to see whether the Court concurred in the Board's action. That was the series of events, as I recall them, and I just wanted to be sure that we are all in agreement that is the way it happened.

A. And subsequently, when I got, and of course, they asked me at the law school what had happened and they said, well, you ought to—when it comes up before the Supreme Court, you should have an opportunity to speak for yourself. It was on that basis.

Mr. Malone: You are entirely within your rights in pursuing the matter further and I don't mean by that question to imply at all that I questioned it or we begrudge you the right or anything else, I merely wanted to be clear that the matter was brought to the Supreme Court.

A. Very informally.

Mr. Malone: On the basis that it was not otherwise going to be presented to the Court and the Board was desirous of reporting the matter to the Court.

Mr. Johnson: Mr. White, you have a question?

Mr. White: One other thing, possibly, further, to clarify the record. You stated in answer to Mr. Dunleavy as to why you quit the Communist party and then when I was [fol. 70] questioning you, my first question was directed to have you state again why you quit the Communist party and you gave the same answer and then when you were answering Mr. Johnson's questions as to your belief in the Communist party, you stated that you no longer believed in certain principles of the Communist party and stated what they were. When did you give up your belief in those principles, was it before you went in the army or after you were in the army or just when?

A. It was probably after I went into the army, it may have been after I left. I mean, you have got to realize I am Rudy Schware, I have been raised in a certain background; that was hammered into me when I was a kid in all the discussions that went on in the family, in all the surroundings. And then I grow older and I grow old and I grow old and some say the older you get the more conservative you get. To me the most important thing today is to provide for my family. Causes come second.

Mr. White: That is all I had.

Mr. Johnson: You mean in answer to his question, that that was a thing that was gradual and you can't put your finger on a particular date, is that what you mean?

A. I couldn't put my finger on a particular date.

Mr. White: It may have been as late as 1944 then that you finally repudiated the principles of the Communist party, 1944 or after, while you were in the army?

A. Well, I, I made a complete break with the Communist party.

[fol. 71] Cross-examination (resumed).

By Mr. Andrews:

Q. I am not talking about the party, I am talking about the repudiation of its principles, that was between 1944 and '46, while you were in the army as near as you can place your finger on it?

A. I couldn't give you the dates.

Q. You still adhere to some of the principles of the Communist party and believe in them?

A. Well, now that is a question I have had arguments with my brother-in-law, who is—who appeared before the House Un-American Activities Committee as a former member of the Communist party and we have discussed certain things and he'd say to me, well, that is the position of the Communist party, and I said, well, I don't know if that is the position of the Communist party but if it is, it is the same thing as the Communist party will always say, that they believe in trade unions. The fact that I believe in trade unionism doesn't mean I am a Communist. I can take that one step further, for instance, in the State of New Mexico, you have the Mine-Mill workers union, which to the best of my knowledge the top leadership is controlled by people who used to be members of the Communist party and who resigned from the Communist party, not in disagreement with the principles of the Communist party but in order to be able to maintain leadership with the union. They talk about trades union unity, that you should have one union federation. Why do they still maintain the Mine-Mill workers union as an individual organization instead of bringing it into the CIO or the AFL. It may mean that some of them on top would lose their jobs. You [fol. 72] see, do you get what I am trying to drive at?

Q. I think I understand. I want to change the subject a little bit. Now the Communist party has long advocated infiltration of labor unions and urged its members to seek executive positions in those unions, is that not correct?

A. That is correct.

Q. Now when you early engaged, first engaged in union

activities, was that at the wish and for the service of the Communist party that you were going that?

A. First to live, to eat, to work; second to build the trade union movement but even when I was a member of the Communist party, to me building a trade union movement doesn't mean building the trade union movement for the Communist party but because the people will get a better standard of living as a result of that activity.

Q. Were you motivated in part by your allegiance to the Communist party?

A. Yes.

Q. Is that still the case in connection with your present union activities?

A. None whatsoever.

Mr. Andrews: That is all.

Mr. Whatley: Are you in accord to the views of the Mine, Mill and Smelter Union?

A. I have just stated I think they ought to go into the CIO or AFL.

Mr. Whatley: I didn't understand that.

[fol. 73] A. And stop being independent.

Mr. Whatley: You didn't say whether or not you thought, as I understood it, that they should go in there?

A. No, my opinion is that you should have one or if it is impossible to have one, to have two, you see, labor organizations, the AFL and the CIO. Now you take your Mine-Mill workers, they are independant for the membership. They would get more and greater benefits if they were to belong to the AFL or the CIO then remaining as independents.

Mr. Whatley: Than they do where they are.

A. So if the Communist party, which preaches trade union unity meant what they said, even though it meant that the top leadership would lose their jobs, they would move Heaven and earth to get them into the CIO or AFL and move themselves out of the picture but they don't do it so between their word and the actions you've got a tremendous gap.

Mr. Whatley: That's all I've got.

Mr. Dunleavy: Now I would like to dictate in the record, it is just a sort of an observation, if you don't mind, and I sort of object to a person asking him whether he still believes in the Communist party. Recently there was a survey made, they stopped people on the streets and asked, what is a Communist. Gee, it is amazing the answers they got. Nobody knows. When you say, Mr. Andrews or Mr. White, I forgot which, do you still believe in some of the principles of the Communist party, political parties have basis things in common. You can't believe in one without certain of the others. For example, they all have basic ideas of voting. They have basic ideas on trade [fol. 74] unions and so on. A broad question is not fair to make to anyone because there must be a certain overlapping of the political parties. I would respectfully like to call attention and I don't want to be telling anybody anything, I just want to make clear my ideas when we speak of Communism, we must distinguish between a political and economic system. Are you referring to Communism as an economic system where you have a collectivist owner of the facilities of production and agriculture or are you speaking as a method of a hierarchy of persons, the elect in the party controlling the whole country such as the Communist party in Russia, which is limited to perhaps a hundred thousand members and they wag the tail.

I just make these observations because it is such a nebulous thing, Communism, could you say that you believe in some of the principles. I make it as no criticism of anyone but I do wish to point out in all fairness—

Mr. Johnson: Are you trying to say, Mr. Dunleavy, that you or I could believe in some one principle of the Republican party and -till not be Republicans?

Mr. Dunleavy: Sure, because we are not Democrats, that the Democrats would be traitors. Any other questions?

(Witness excused.)

MOSSHAY P. MANN, a witness of lawful age, having first been duly sworn, upon his oath, testified as follows:

[fol. 75]

Direct examination.

By Mr. Dunleavy:

Q. What is your name?

A. Moshay P. Mann.

Q. What is your occupation?

A. I am a Rabbi of Congregation B'Nai Israel.

Q. That is here in Albuquerque?

A. Yes, sir.

Q. How long have you been the Rabbi there?

A. Oh, close to two years.

Q. Are you acquainted with Rudolph Schware?

A. Yes, sir.

Q. And the members of his family?

A. Yes, sir.

Q. How long have you known him?

A. A little over a year.

Q. Has your association or knowledge of him been casual or has it been close and intimate or exactly what is your relationship with him?

A. The relationship started when Mr. Schware asked me about helping him to have his child obtain a religious education. He could not afford to become a member of the Congregation at that time because of financial reasons and the problem of getting the child into the school came up and I saw to it that the child was committed and it received religious education. Mr. Schware was very much interested and the child attended regularly. He used to bring the child every Sunday morning and during those Sunday mornings we had occasion to get acquainted and he was very much interested in the progress of his daughter.

[fol. 76] Q. Is he and his wife a member of your Congregation?

A. Yes, sir.

Q. During the period you have known him has your association been sufficiently close to allow you to form an opinion as to his moral character?

A. Yes, sir, I have a very high opinion of Mr. Schware.

I know that not only from the religious angle as such that he was devoted to the ideals of the synagogue but even in his social outlook, such as the problem of discrimination against the workers and against Jews, in which he was vitally interested and he called my attention to such problems, from time to time.

Q. What is your opinion as to his moral character?

A. As far as I know I think it is very high.

Q. In connection with Judaism is membership in the Communist party or the principles of Communism compatible with the teachings of Judaism?

A. The principles of Communism, generally speaking, are as incompatible with Judaism as they are with the dawn of religious christianity. Judaism regards primarily the faith in God as the prime principle, which of course Communism, as far as I know, is atheistically inclined to say the least. Judaism believes in the dignity of man and that means the dignity of the individual. With Communism it is the state that is uppermost and the individual is to be sacrificed. The principle of Judaism is equality of opportunity and freedom of man. As far as Communism is concerned it is the worship of the dictator and the state and the interest of everyone underneath that, it means nothing. [fol. 77] So you can see roughly speaking, I can't get into all the details, that Communism and Judaism cannot go hand in hand.

Q. They are utterly irreconcilable?

A. That is right.

Mr. Dunleavy: I have no further questions.

Mr. Malone: No questions.

(Witness excused.)

JULIA R. McCULLOCH, a witness of lawful age, having first been duly sworn, upon her oath, testified as follows:

Direct examination.

By Mr. Dunleavy:

Q. What is your name?

A. Julia R. McCulloch.

Q. By whom are you employed?

A. University of New Mexico, College of Law.

Q. Who do you work for there?

A. Dean A. L. Gausewitz.

Q. You are the secretary to Dean Gausewitz?

A. Yes, sir.

Q. Is Dean Gausewitz in town now?

A. No, he is on sabbatic leave.

Q. In connection with your duties as secretary to the Dean, are you familiar with scholarships at the university, in the law school?

A. Yes, sir.

[fol. 78] Q. Are you familiar with an anonymous scholarship for indigent students?

A. Yes, sir.

Q. Who is the donor of that?

A. Mr. Rudolph Schware was the donor of anonymous Scholarship No. 1.

Q. And in what amount?

A. \$50.00 annuall-.

Q. Who knows about this scholarship?

A. The Dean and I.

Q. When did it commence?

A. It was presented in the academic year 1950, '51, and was awarded, the first one at the 1951 law day.

Q. And has it been continued each year since then?

A. Yes, sir.

Q. A total of four, as I understand it?

A. Yes, sir.

Q. In connection with your duties around the law school, have you had an opportunity to have any dealings with Mr. Schware?

A. Yes, sir.

Q. In a business way?

A. Outside of the law school, yes sir.

Q. Both in and out of the law school?

A. Yes, sir.

Q. Has your association or knowledge of him been fairly intimate?

A. I would say so.

Q. Has your association been such as to form an opinion [fol. 79] of his character?

A. Yes, sir.

Q. What is your opinion as to Mr. Schware's character?

A. In my opinion Mr. Schware is an honorable man, scrupulously honest and fair.

Mr. Dunleavy: That is all. Thank you. Any other questions?

(Witness excused.)

MONROE Fox, a witness of lawful age, having first been duly sworn, upon his oath, testified as follows:

Direct examination.

By Mr. Dunleavy:

Q. What is your name?

A. My name is Monroe Fox.

Q. Where do you live?

A. In Chama, New Mexico.

Q. What is your business or occupation?

A. I am now an attorney.

Q. And you practice law there?

A. In Chama, yes, sir.

Q. You are a graduate of the University of New Mexico law School?

A. That is correct.

Q. How long have you known Rudolph Schware?

A. I have known Mr. Schware since September of 1950, that would make it almost five years now, will be four years in September.

Q. For the purposes of the record, you are blind, are you not, Mr. Fox?

A. Yes, sir, that is correct.

Q. In attending law school who assisted you in your [fol. 80] reading duties and other things like that?

A. My wife did most of my reading for me.

Q. During the course of your studies at the university, did you become fairly well acquainted with Mr. Schware?

A. I did.

Q. Did you have occasion to study with him?

A. Quite often.

Q. Did you become a close personal friend of his?

A. Yes, sir, I consider Mr. Schware to be a personal friend.

A. And he is a close personal friend?

A. Yes, sir, a close personal friend.

Q. During the time that you were in law school you had to rely not only in your wife to assist you in the various difficulties as a result of your blindness but various other students?

A. On various occasions, quite often, yes, sir.

Q. Did Mr. Schware help you at all?

A. Mr. Schware helped me a great deal. Many times Mr. Schware offered his services to read to me when my wife for some reason or other couldn't help me and other times he assisted me about the building and of course other times we discussed cases together so that we were both more clear on the cases and he was a great aid to me.

Q. And even to the extent of considerable inconvenience to him?

A. That is correct, there were many times, for example, that Mr. Schware went out of his way to offer me transportation to and from my home to law school.

Q. As a result of your association with him in the law school, were you able to form an opinion as to his character?

A. Yes, certainly, sir.

Q. What is your opinion?

A. Well, my opinion of Mr. Schware is that he is a very sound man, a man of integrity, he has principles, those principles, I believe, are very democratic ones, and he not

only has principles, he has the courage and the—to back his convictions.

Q. Is he a person in whom you, as a lawyer, would place confidence?

A. I most assuredly would.

Q. And accept his word in legal matters?

A. That is correct, I certainly would.

A. Being a blind person, I presume, that you must rely a great deal in intuition?

A. That is correct.

Q. And for example, you can't observe people's faces or the color of their skin or the clothes they wear?

A. That is true.

Q. And both by intuition and knowledge and close association you believe that he is a person of high moral character?

A. I do, certainly, sir.

Q. And you personally would recommend his admission to the Bar?

A. I would recommend that he be admitted to the Bar. I believe that Mr. Schware with his principles and his courage would be a definite addition to any society and particularly a society of our profession, where we are in a [fol. 82] position to help people and I believe Mr. Schware truly has the moral convictions and the courage to carry out his convictions and be of great aid as a member of the Bar.

Mr. Dunleavy: I have no further questions.

Mr. Johnson: No questions.

(Witness excused.)

Mr. Dunleavy: I have no further witnesses. I would like to say a few things.

(Off the record.)

Mr. Johnson: What about these letters and so forth?

Mr. Dunleavy: I'd like to have them introduced in evidence and made a part of the record.

Mr. Johnson: And also those recommendations?

Mr. Dunleavy: All those.

Mr. Johnson: Shall we just have them attached to the original deposition without having copies made of them?

Mr. Malone: I think so.

Mr. Johnson: We will just attach them to the original.

Mr. Dunleavy: Thank you.

[fol. 83] STATE OF NEW MEXICO,
County of Bernalillo, ss.:

I, Margaret McCoskey, Notary Public in and for the County of Bernalillo, State of New Mexico, do hereby certify that the foregoing and attached Special Meeting of the Board of Bar Examiners was taken by me on Friday, July 16, 1954, in the offices of Messrs. Iden and Johnson, 715 First National Bank Building, Albuquerque, New Mexico; that all witnesses were by me sworn to testify to the truth, the whole truth and nothing but the truth prior to the giving of their testimony; that said hearing was taken by me in Stenotype and reduced to typewritten transcript; and said Testimony is a true and correct record of the testimony given by said witnesses; and

I further certify that I am neither attorney for, nor related to or employed by any of the parties to this action and, further, that I am not a relative or employee of any attorney or any of the parties hereto, or financially interested in the action.

Witness my hand and seal this 10th day of August, 1954, in the City of Albuquerque, County of Bernalillo, State of New Mexico.

(S.) Margaret McCaskey, Notary Public.

My commission expires:

August 15, 1956.

[fol. 84]

APPLICANT'S EXHIBIT 1

PFC R. Schware
Co. G—187th Glider Inf.
APO 468—Camp Polk
Louisiana

Bette Kemeny
3804 Colonial
Dallas, Texas
511th Parachute Infantry

Thursday, March 16, 1944

Dear Bette:

Knew I couldn't keep it up. A letter a day is more than could be expected of me. Actually if I still didn't see your face before me wouldn't write more than once a week.

There are rumours floating around that we will not get week end passes Saturday. Am hoping and praying it's not true. Never believe anything until it happens. One thing is certain about this army of ours, its uncertainty. However if I can't make it in will phone you around 1 P. M.

One thing sort of interests me. You asked me my politics. For the past few years have been known as a liberal Democrat. Once upon a time an active member and supporter of the extreme left, speaking now of the Communist Party. You said you were a traveller. In just what sense did you make the statement?

They are attempting to make jumpers out of this entire outfit. Kind of hard to give the boys instructions in the technique of jumping. Helping to build up their muscles so that they can absorb the shock of a parachute landing. Giving private and non-coms push ups as punishment for minor infractions of the rules we lay down. An instructors life is no bed of Roses. Believe that comes nite am just as tired as they are.

Look forward to the day when I'll be transferred back to my old company. Miss old friends. Make new ones it's true. But not like confiding to Thomas, or Ernie, etc.

Incidentally my intentions are honorable. This being leap year, et al, if a certain young woman were to pop a [fol. 85] question, would throw overboard all my avowed

intentions of remaining a member of the grand and glorious fraternity "Bachelor" and get hooked. Hope I'm not scaring you.

Not much more to say. The hours, minutes, seconds, seem to go slower than the blazes. Each minute until I see you is wasted.

'Tis one of those things. Boy looks at gal, knows then and there that the perennial search has come to an end. Just when time is so short too.

But still consider myself lucky in meeting you.

Love: (S.) Rudy.

APPLICANT'S EXHIBIT 2

PFC R. Schware—35542045
Co. G, 187th Gli. Inf—APO 468
c/o Postmaster, San Francisco, Cal.

Mrs. Bette Schware
3804 Colonial
Dallas, Texas

Airmail

May 1, 1944

Sweetheart:

Today was May 1st. There used to be a time when on this particular day I never would work but instead dress myself up in my best and take off with the other proletarians in a May 1st parade, demonstration and later on at night, a mass meeting. May 1st is the workers holiday born in the travail of the Chicago stockyard workers who went thru the Haymarket Massacre fighting for an 8 hour day. But now your loving husband pulls K. P., gets up 3:15 A. M. to do so, eats a hearty breakfast with toast of course, waits for the sun to come out, lies down on the grass, and goes to sleep. Wakes up sweating. A hot day. The sun felt good. How times have changed.

[fol. 86] Darling you worry me. Please, please take darn good care of yourself. Get rid of the gol darn cold as fast as you can. 'Tis spring. Not the season for sore throats, running noses, etc. Promise, honey!

Am glad that you received the letter of welcome into

the family from my mother. Told you would be so. She's a swellegant person. Starting off kind of early with secrets. Go ahead, young woman, keep your secret. I'll turn the FBI out and see what my mother has to say. Know darn well tho she won't tell me either. (Am laughing and smiling to myself as I wrote the above.) 'Twas ever so, will always be so. Women and their ways. I love you toots.

Had a kind of big mail call. Two letters from yourself, makes up for the absence of mail yesterday, and three others. But looks as if my hunch isn't working out. Still no mail for me from home. Write diligently too. You probably noticed that. Hope I get a letter from them before we leave here.

Haven't run into any of the old company boys yet. No doubt will over there, wherever it may be. Will give them your message to look after me. Thought I was capable of doing so on my own, but am ready, willing and able to accept any and all assistance, from whatever quarter, just so I come back to you. The sooner the better. Miss them tho. Not as much as I do you however.

Go right ahead and type. Whichever is easier for you. Perhaps I never told you but someday may surprise you with my knowledge of typing. Strut some mean fingers. (The truth—Peck and Hunt).

Am sending you \$25 tomorrow. My hobby fund. Put it to good use. Comes with the compliments of the boys who play cards with me every now and then. Its a nice hobby I've newly acquired. Let's the little Mrs. know how much I love her.

Pretty late now. Have so much I want to say. But time for writing is pretty scarce. When I get on the boat will start in on my life history and everything else that runs thru my mind.

Good night, dearest. Once more, I repeat, get well. As long as you are sick I can't be happy.

Regards to the Abrams.

Love & kisses (S.) Rudy.

[fol. 87]

APPLICANT'S EXHIBIT 3

PFC R. Schware—35542045
 Co. G—187th Gli. Inf. APO 468
 o/o P. M.—San Francisco Calif.

Mrs. Rudolph Schware
 3804 Colonial
 Dallas, Texas

Tuesday, May 9th

Wonderful Darling:

Never got around to writing more last night. Instead, like the fool I am, played pinochle. Won a couple of bucks, but is it as important as writing to you? Don't think so.

Have been doing nothing all day long but lazy around. Didn't even bother to eat any meals. Instead had an orange, an apple and a chocolate bar. Getting kinda fat, eating and sleeping. Am in the mood for a nice short 25 mile hike. At least you keep in good condition with a lot of hard work.

How have you been sweetheart? Does the cold still bother you? And honey, just realized how much time has gone by and am wondering, wondering and I suppose will worry until I hear from you again as to your condition. Funny how when a fellow is single he never gives those things a thought. Now an old love sick married man has his fingers crossed and hopes you get your wish.

Time out now my sweet while I sort of index your letters and reread them one by one, looking for questions and will answer each one in turn. When that is out of the way will be ready to start in on myself.

Wednesday 7:30 A. M.

Started reading your letters to me. Interrupted by supper, then went to the movies, an old picture, Errol Flynn in Gentleman Jim. Read a little more and the lites went out. So here I am again saying hello to the best woman on earth, Mrs. Bette Schware.

Cursed myself too after I read your letters. Because there as plain as ever stood her address staring me in the face and saying: "You gol darn fool, don't ever again rush

yourself to the point where you miss seeing what you're looking at. Believe however Fredell should have received my letter. At least the address was correct.

Incidentally before I start answering the questions want [fol. 88] to repeat once more, get a big kick out of rereading your sweet letters to me. Show me what a lucky fellow I am in having you as my wife. You will never regret it. And here is time out for me to once more say, from way deep down, every part of me says I adore you. Do I embarrass you?

Your first letter: These points raised. 1) Were you in the picture. A. No. 2) Why do they use the term stick. A. Just do. Don't know the origin of the term myself but as you said it represents a group of paratroopers jumping from one plane at the same time. Fraction of second intervals, of course. 3) Did I ever use the bucket. A. Will confess that unlike the Captain of the Pinafore who said: "I'm never, never sick at sea" and when repeatedly asked by the crew, "What never?" at last replies: "Hardly ever", I've never been sea or airsick and never had to use the bucket. 4) Are you in or out? You know the answer to that one by now. A trooper at sea. And one who loves you very much and will always cherish this first letter written exactly five days after you met me in what seems like ages ago, the month of March 1944.

Your second letter. No questions. But gives me a very clear picture of a beautiful girl falling in love with a strange man, one who already knew that his search for a mate was over. So the people of Dallas talk and we have snatched a few hours of happiness in a war torn world and will resume after victory. And darling, if anyone but me calls you a brazen hussy, tell me about it and I'll make short shift of him.

4th letter. About an enlargement. Believe my folks have the negatives now. And if I know Harry, he'll get one made. Incidentally any further word from my folks?

And you promise to have a date with me when Victory is won. Absolutely must keep that one. Nothing could keep me away.

5th letter mailed March 30th. The question of my enlisting to fight on the side of the Spanish Republicans against Franco, Hitler & Mussolini. Was in Detroit at

the time. In my position as Secretary of the Wayne County Workers Alliance and also a Chairman of the Single Men's Unemployed League (more on this organization later) was very strategically placed for getting recruits to go across.

And much as I hated it, because I was doing such a good job they kept on putting off and off my own date of departure. Finally put my feet down and insisted to be allowed to go. By this time it was getting toward the end. Finances were low. Arrived in New York with two auto workers. Were given a weeks vacation.

The boys were now going across without passports and stowing away on ships going to France. 'Twas a beautiful system elaborately worked out and couldn't have been successful if the crews weren't overwhelmingly sympathetic to the cause.

[fol. 89] Remember now as if it had just happened. There were 5 of us. Two from San Francisco, us three from Detroit. One morning the S. F. boys left and came back the next day. They had gotten caught. Were unfamiliar with ships. That afternoon the announcement, "We will only be able to send four. One of you will have to go back home."

A simple problem in arithmetic and finances. Cost less to send one person back to Detroit than San Francisco. The choice was left to us as to which one goes back. The 3 of us flipped coins. Two tails and one head fell. I had flipped a head. Given a bus ticket back to Detroit. Cursing my hard luck went back and resumed where I had left off. Thus ends a tale of how not to get to Spain. Incidentally of the last four who left, only one of the Detroit boys lived to come back.

Realize that I have misplaced a couple of your letters. Probably on the bottom of my duffle bag. Know this for a fact because I'll never forget the words you used, "This weekend was definitely your inning."

You tell of your experiences at the office when you came in wearing the set of Wings I had given you. Now a long break in between letters. Wonder why. Couldn't have been a certain phone call, a telegram, sweating out a pass, saying "I do!" and the most wonderful week end in history! From here on in she no longer signs her name

Kemeng but uses the title Mrs. Schware. I love her so. Happy, happy, me. Wonderful, wonderful, Bette.

Let me know when you receive the articles.

There's nothing like rereading mail. Your letter of April 22nd mentions your brother Jack. Now I am surprised. Just dawned on me that you have two brothers, one Sam the other Jack. Which is which dearest? Both in the service? Jack, Georgia, schoolmarm trouble? Sam, Florida, anxious to get into intelligence? Do you see the dilemma I'm in with the realization? Say hello to both of them from me will ya honey.

Question: "Am I chattering to much?" Answer, Chatter away to your hearts content. I love it. The recorder at the moment is playing "This Will Be My Shining Hour". Feel just as the words and music say.

Saturday nites letter. "Do I miss you?" Can you imagine just how much. Although I am anxious to get into the scrap and really do my share to win the war, altho this trip is like one grand vacation, a cruise with all expenses paid, and with my salary now \$114.80 a month, still am positive I'd chuck it all to be with you in Dallas right now. To hold you, kiss you, make love to you. What could be sweeter. Heaven on earth that's just what it would be. [fol. 90] Wanted to mention this before but don't believe I did so. So you pay less taxes now. As you say, it's just what I've always maintained. There is nothing like marriage for two love birds.

Will put in a request for Because and Long Ago & Far Away. Hope they have the records on board.

Bob Parker? The name doesn't strike a familiar chord. Don't believe I have.

Readers Digest. Will it make you happy? Go ahead and get it for me, dearest. And now see where you asked the question about "grounds for divorce". So my pet, I swiped a copy from you. Go ahead and report it to the police. I'll shout from the rooftops, I love her, love her, love her, don't care who knows it, one look at me and the world can see anyway. 'Tis a hard case you'll have. Am laughing as I write this, and Green is watching me and I'm sure he's wondering what I find so amusing. Come 11:30 P. M. each nite we'll do more than go "cluck, cluck". Or will we be to happy to remember?

I enjoyed the picture "A Guy Named Joe" to. Never thought of the song as coming from it. So when it rains you blame me. And all the time I thought I'm the guy who brings sunshine wherever I go. Am putting in a special order to the man above telling him to cut it out. Only a reasonable amount every now and then and none on week-ends from now on. One never can tell. Such a request may be granted.

Am now down to the last letter I've received from you. Am sure there will be some waiting for me when we reach our destination. My behind is kind of tired a little. Using my life preserver as a pillow. The sun coming out thru the clouds. Will stretch for a while and then resume once more. Two whole hours have gone by since I started in this morning and I've been thinking of you all the time to. Wonder why? Could it be, am I, do I, believe, heck no, that's just putting it mildly. I am in love.

10 A. M.

Like yourself realize the disadvantages of V mail. So if you don't want to, just keep on writing the same as always. I was just thinking in terms of speed, the saving of cargo space, etc. But am positive there is nothing half so good as the envelope you yourself have written and the pages you wrote in your own handwriting instead of a photograph. So let's forget the suggestion. O. K.?

About Beverly. Could be the gal has some designs on me. She's young tho. 22 years old. Just out of school. Myself say: "Why take chances." The news might make her quit and then again am almost positive it wouldn't. So let it stand as is. Will send you one of her letters and you can judge for yourself.

[fol. 91] In a little while am going to go down below and play pinochle for an hour or so. My form of recreation and of course one means of raising the ante in my hobby fund. Yesterday made a 450 spade hand. Collected \$12 on it. Comes once in a blue moon. So slowly but surely the fund increases. Hope you have no objections.

Will spend the afternoon catching up on mail. Writing home, etc.

The sun is pretty hot so will go below now.

Mr. Schware once again says to a certain Mrs. Schware

Love: (S.) Rudy

P. S. Take good care of yourself darling. Your cold completely gone? How is your health? Any new developments physically speaking? Am very anxious and very much concerned about you.

(S.) R.

P. S. S. Regards to the Abrams and the rest..

(S.) R.

P. S. S. S. Went and dood it again. Taking away your individuality. Making you into a male. Bette is a much nicer name than Rudolph. Simply adore yours.

(S.) R.

APPLICANT'S EXHIBIT 4

PFC R. Schware 35542045
Co. G—187th Gli. Inf. APO 468
c/o P. M.—San Francisco Cal.

Mrs. Bette Schware
3804 Colonial
Dallas, Texas.

May 13, 1944
11 A. M.

Hi Beautiful:

Don't blame me too much if this paper is all blotted up. [fol. 92] The sun beats down and as usual I sweat.

The loudspeaker gives us the news. So even while out at sea can keep abreast of the times and in a limited way know what is happening. Every day tho ask myself the question, WHEN? When will the second front be opened up?

So the C 10 beat Montgomery Ward. That's good news. Gen. Leonard Wood head of that firm is one of the main boys who are out to get Roosevelt and want negotiated peace with Hitler. An isolationist and an appeaser.

From reports, the Italian front, altho only of secondary importance in relation to the big picture, once again shows activity. Perhaps that is an indicator that the time is ripe.

Honey do you realize that as of today one month has gone by since we became man and wife? And so I send

you greetings on this day in obsentia, kiss you, wish you well, wonder how you are, what you're doing, whether you will remember to reserve that dance for me to nite, and once more inform you that I love you so.

Going down to get an apple. Will resume later.

Will now go into the saga of Pete Kowal. You want to know about my friends just as I want to know about yours.

Pete was born in Armenia, the only son, two sisters. Most of his life lived on a farm just outside of Pittsburgh, Pa. A year younger than myself. His English was never of the best, but all heart. And of course steady as a rock.

Like so many other homes, the depression took a toll of his. The farm mortgaged to the hilt finally taken away from them. The family separated. His father went to Windsor, Canada. His mother and sisters to Pittsburgh. All three did housework there. Pete wandered from one place to another and finally landed in Detroit.

No job, no money, holes worn thru his shoes, hungry, some one told him about Fishers Lodge. He was admitted to the place the day our leaflets calling for an organizational meeting were distributed. Not having anything else to do and mainly out of curiosity he came to see what was going on.

At the meeting he got up and said it was a crime they wouldn't fix a man's shoes. And he was willing to support any organization that could get those things done. Our small hall was crowded to the rafters. Capacity only two hundred. The men decided to organize. I was elected chairman and I nominated Pete as one of the 15 committeeman. 'Twas thus we met.

Detroit is cold in the wintertime. And altho our organization grew by leaps and bounds, our immediate gains weren't so great. The food immediately improved. We had our own dietician who submitted the menu and the men were fed on the basis of our menu. But jobs was something [fol. 93] else. And purposely we in the Alliance had raised jobs as our No. 1 slogan. Everything else was secondary.

Like many others who had joined a labor organization for the first time, when they didn't get jobs right away, became discouraged, Pete included. Sometimes a fellow

looks at some one and instinctively can see the good in another person. - Pete and I had become friends.

The snow was coming down pretty heavy. He told me one nite he was quitting. Couldn't see where we were accomplishing much. Looked like a waste of his time. Was therefore departing for points unknown.

We took a long walk in the snow that nite. Got wet and shivered, but somehow or other didn't mind it. Instead of dealing with just the local picture I spoke to him of broader horizons of the world picture, what caused depression and mainly showed how some day, under the leadership of the Working class a better world would exist. That all of us, individually had a part to play. Told him for the first time that nite that I was a member of the Communist Party and asked him to join.

On mentioning Spain said that soon I would be going across, that someone would be needed to take my place, that despite his lack of experience thru diligent study he was capable of being that person, that it meant hard work, something he was used to, and besides wherever he went he would run into the same conditions as existed in Detroit.

He joined the party and decided to stick it out. From that nite we were inseparable. I had a job on my hands too. Everything I knew about the labor movement, about organization, my own experiences, were told to Pete. Decided even to live together and took time out the next day to rent a room. Did I mention finances were rather limited. My salary ostensibly was \$25 a week. Considered myself lucky when I saw \$10. Usually slightly less.

Will never forget how we finally located a place that looked decent and at the same time also fitted in with our finances. Went to sleep about 1 A. M. Ten minutes later were out and all packed on our way to Alliance headquarters to spend the nite there. Bedbugs galore. Learnt a lesson. Always look underneath the mattress, in the corners, etc. No matter how clean a place looks superficially, taint always so.

Got our money back the next day, borrowed some and rented a big six room furnished house. We lived in that house until Pete got married. The next week the secretary we had wasn't doing so hot, ousted him and Pete elected in his place.

[fol. 94] Pete helped me with recruiting too. As a result he was arrested with me by the FBI on February 6, 1940. Became a member of an exclusive club, the 59ers. All our prison numbers I believe started with 59.

When we won our WPA job victory, Pete went to work as a carpenter. Paid \$94 a month. An awful lot of money to us at the time. He studied hard and slowly and surely began making a place for himself in Detroit Labor.

One by one his family converged on our house and moved in. Brings me to another memory of Detroit. As a general rule on Saturday nite we would go to a house party or dance. His sisters insisted on going to 5:30 A. M. mass. We lived in what was considered a pretty tough neighborhood, and as he refused to do so, I would leave early for home and escort them there and back.

He met Jean, she worked in the office of one of the VAW locals, fell in love, married the gal. Both his sisters met fellows and did it to. The last I heard from him was working in an auto shop, chairman of the shop committee and had told me he had been sent last winter to attend a party training school in New York.

I left the Party. Pete is still in, but despite this we are still great friends. There are a lot of things I left out in this short resume. But gave you the hi lites.

Have a few things to do so will quit now. Love you very, very much Mrs. Schware. Will be with you on one of these anniversaries. The sooner the better.

(S.) Rudy

APPLICANT'S EXHIBIT 5

PFC R. Schware—35542045
Co. G—187th Gli Inf—APO 468
c/o P. M. San Francisco Cal.

Mrs. Bette Schware
3804 Colonial
Dallas, Texas

Wednesday, June 7, 1944
By Improvised lamp lite

Dearest Bette:

Today for the first time we received news of the outside world. In the form of an 11th Airborne Division Daily News Bulletin. And what good news. Really something to make a fellow sit up and take notice.

[fol. 95] You know what I mean. The curtain has been lifted. The invasion started. 20,000 paratroopers drop from the skies onto French soil. The beginning of the end for Hitlerism and all the filth his name represents to the world.

As far as I can see his doom is sealed. Has at the most a year to live. Events may transpire tho to cut his rule shorter by many many months. Hope so.

Except for the fate or shall we say the power that be I could have been one of the men who jumped in France. Am sure that Danny Hickman, Butchkowski and a few others from my old company took part. As you know would very much preferred to have been one of them. A fellow can't expect all the breaks tho. The japs have to be defeated also. My time will come. Others of my friends will help avenge Joe. He didn't die in vain.

Received two candles per tent as rations today. Are supposed to last us a week. To supplement them improvised our own lites. Using empty glass bottles, empty cans, inside of cocoanuts, empty 50 caliber shells, and what not, a small piece of thick canvas as a wick, some kerosene, and there you are. Almost as good as electric lite.

Has one disadvantage, rather a couple. Smokes quite a bit and the flame keeps flickering now high, now low, and in some respects is hard on the eyes. But hang the incon-

veniences, means I don't have to board anymore and can now write to my hearts content. Then too, will now be able to do a little reading at nite.

A few days ago most of us turned in all our spare American money to be exchanged for Australian. (Time out for a good one.) We finally got around to enlarging our tent today. One of the logs used for support now turns out to be the home of a veritable host of piss ants. Started crawling all over my cot and on my body. Investigated and found the cause. Will have to tear it down tomorrow. In the meantime went on an ant hunt. Will resume as soon as I finish this letter.

Great sport darling. Dip a pole in kerosene, lite the end, and start burning them. Find the knot holes in the wood they come out of, pour a little kerosene in that. Put insect repellent powder on the logs (ordinary foot powder) and those you miss by the above methods, kill by hand. The damn things really are a nuisance cause it makes me waste so much valuable time. Time that can be used to much better advantage writing to you. Cause I love you Blue Eyes.

Finally worked out my letter writing to a science. You once a day. My family, the various members, every other day, and whenever I am able to my friends.

Seem to have been sidetracked by what I shall call the incident of the ants. Was speaking of matters financial. Last nite we were given our exchanged money back. Of course a poker game started immediately. Was going to [fol. 96] go to sleep early, but right after bed check, walked over, one of the fellows had just gone broke, took his place, and one hour later had added six more dollars to the fund. Only a nickle and dime game.

But there is an aftermath to the above. Sometime today, someone, have my suspicions, but at the moment can't prove it, tomorrow will set a permanent trap, stole a pound note out of my wallet. Was given four and now there are only three. Didn't keep it on my person as I should have done, but kept it in the box I have for my toilet articles and other miscellaneous items. Only the fellows in the tent knew about it. Actually not all of them. Result, one certain person must be the thief. Honestly, hope I'm wrong. That

some one from another company did the dirty trick. But then a stranger would have taken it all. And during the day the only time I wasn't close by was while eating. Say to myself, a mistake was made, only received three notes, but know 't isn't so, definitely had four. Damn. Don't care about the money. Wouldn't make me or break me. But just like the matter of the nightly bed check it's the idea of the thing. That one man in my own squad is low enough to be a sneak thief. And we go into combat together.

About all of any importance that has happened. The invasion good news, thievery bad.

Love you oh so much. Want you more than ever. Our time will come. This morning singing "Oh What a Beautiful Morning" (and tonite, of all things, "I'll be Home for Xmas"). Wish I could be.

How are you darling? Altho it isn't so, today no one thought about me. Not even one teeny weeny letter. Actually the last two mail calls in the company have been mighty slim. Soon our mail will begin to catch up.

Have a chore to do if I expect to sleep peacefully tonite. Must resume my ant hunt. Good night my love, sleep tite, until tomorrow.

Love: (S.) Rudy.

APPLICANT'S EXHIBIT 6

Pvt. R. Schware—35542045
Co. G—187th Gli. Inf—APO 468
c/o P. M.—San Francisco, Calif.

Mrs. Bette Schware
3804 Colonial
Dallas, Texas

[fol. 97]

Tuesday—June 13, 1944
Improvised lite

Dearest Wife:

Had two reminders of this day. Look up above and verily you will see what I meaneth. First two most wel-

come letters from you. May 23rd & 26th. How did you enjoy your visit with Fredell wonderful!

Second the enclosed card from the Leesville U. S. O. Shall we keep it as a memento? All during the day have thought about you. Didn't do much all day long so had plenty of time.

Actually most of the time spent in bull session with the boys. Our talk centered mainly around a number of topics which cannot be mentioned in letters. All a result of our Divisional Commander giving us a pep talk.

The debates in our tents waxed hot and heavy. Enjoyed myself, what with every few minutes putting my two cents worth in. A long time since I've debated so you can very well picture me in my element.

The first letter from Fredell arrived. Quite interesting and will answer at the earliest opportunity. Also received word from the Veteran's Administration notifying me that the change in beneficiary on the insurance policy has gone thru and been approved. So our license didn't have to be notarized after all. When you asked me to send it back couldn't do it. Had already turned it in. Speaking of insurance, reminds me I have a civilian policy that will need some changing. Will write tomorrow. Plumb forgot all about it.

Before going to sleep last nite, lay on the cot and kept singing until the fellows got tired of my screeching and gave the gentle hint: "Shut Up!"

Oh those comics. All the boys in the tent read them. The first time in what seems like ages that we knew what Lil Abner was doing. Thanks an awful lot. A second anniversary present that was very welcome.

Tell me the results of your plastic surgery. Did you do a good job? How could you have distorted the nose in the first place? Will be on pins and needles until I know. Will answer your questions tomorrow.

It's pretty late now Bette. Time for a soldier boy to hit the hay and dream of the one and only.

Would be an understatement by just saying I Love You. My heart is filled to overflowing.

You mentioned a Rabbi friend of yours. Seems I have a nitely chore. An atheist, like myself, reading a chapter

from the Bible each nite to Sampson. And we insist on absolute quite while it is being done. 8th chapter of Mat-hews tonite.

A trillion kisses beautiful toots. Wink those blue eyes [fol. 98] at me. Hello to the Abrams and Celia. To bed, to bed. Good nite, pleasant dreams.

Love: (S.) Rudy.

APPLICANT'S EXHIBIT 7

PFC R. Schware—35542045
Co. G—187th Gli. Inf.—APO 468
c/o P. M.—San Francisco, Cal.

Mrs. Bette Schware
3804 Colonial
Dallas, Texas

Wednesday—June 14, 1944
9 P. M.

Hi Toots:

Miracle of Miracles we received a partial pay today. So am having check for \$25 made out to you and will mail it as soon as finance makes it out. Was paid thirty and getting rid of fifty. The balance to the folks.

Miracle number two. Our mail orderly received air mail stamped envelopes. Means that for the next month will be able to send all letters out via air and possibly speed my messages up by at least a week.

Thirdly, the Chaplain came thru once again and I now have this tablet which, provided I shorten letters, should last at least a week. After that will see what the Red Cross has to offer. Their is no stationery for sale any wheres around these parts.

For once put in a real good hard day's work. Moving some heavy cans of tar from one field to another. Made the sweat flow. One consolation Sampson washed a pair of fatigues for me.

The days and weeks roll slowly by. We work, take things easy. Play some cards, argue, and begin to wonder

when our training will start. Not that I'll be able to tell you anything about it, the Army, and the security of all the men in the Division depend on those on the outside, and even most beloved wives and members of your family are thus considered, shouldn't know a thing about what you personally are doing. 'Tis better so.

[fol. 99] Am not sure it will pass by the censor but will try to let you know how this paratrooper husband of yours will make out on his next jump. Not the details of anything connected with it, but just no broken legs, ankles or bones.

Know you worry about me. Not necessary tho. Sweetheart one of the safest things in the world is to jump. Like it. Look forward to the time I'll get another chance to stand up, hook up, and yell Geronimo. Besides ain't I a lucky guy? Haven't I got the most beautiful, most adorable, sweetest, most conscientious and thoughtful gal in the world as my mate?

Started a letter to Fredell this morning. Haven't had a chance to finish it. Will do so tomorrow for sure.

About the book of my brother's poetry. Have always maintained that it Stinks. As Mike says: "We're a slightly screwy family but plenty O. K." Well Herman was the nut. His nickname Rabelais. Never did get along with him because our politics were on very divergent paths. Always at loggerheads. He was smart. Can't deny that. But from earliest childhood, run over by a car, had a weak heart which led to an early death.

If my memory doesn't fail me, once upon a time, during those hardworking days when I helped out the milkman and attended grammar school, won second place in an elocution contest reciting: "Friends, Romans and countrymen, Lend me your Ears." The prize a book of Shakespear's complete works in prose. He occupies a prominent place in the extensive library our family has accumulated over the years. When I was last home on furlo took my sisters Pearl and Beverly out one nite to see Paul Robeson in Othello. Will reread his works many a time again as old age creeps up. Will you let me read a few passages out loud to you when I come home from the wars?

So you hired Kravity as a press agent. Will keep your

secret and tell you very frankly don't believe a word of it. You never have and never will need one. And am smiling as I write. As I told my folks, my best friends and as I have seen from your friends "To know you is to love you." Nuff said!

How do you like Mike's style of writing. He wrote one real good book on his experiences as a seaman. Only read one other of his books, didn't enjoy it in the least. Will admit he has talent. He always was the darling of the family, but am positive the new addition will chase him off his pedestal without any competition.

Here I write and write and forget all about the passage of time. Must be because whenever I do feel so close to you that if I stretched my hand out would be able to touch your soft body. Will always be so.

But the flickering of the lite is hard on the eyes, Have temporarily given up the idea of electricity. A shortage of batteries. A reminder to me that I'm not back in the states.

[fol. 100] Beloved you say there is so much you want to know about me. The passage of time will reveal all. Am good and bad, truly mostly good. Smart and dumb. A little smacking of intelligence. But smart enough to take advantage of the fates that brought us together. Up till a few years ago always looking after the other persons welfare with the utter disregard of his own. Not any more Bette. Your're always going to be my most wonderful and swelegent headache. And no objections will be countenanced.

Reminds me, are the spelling lessons gonna be continued. Any recent blunders? And when it comes to vocabulary in comparison to you I run a close twentieth.

By- for now. Miss you more than I thought possible my Chin-Up-Gal.

Pleasant dreams. A nice long kiss.

Love: (S.) Rudy.

P. S. No mail today.

.

APPLICANT'S EXHIBIT 8

PFC R. Schware—35542045
Co., G—187th Gli. Inf. APO 468
c/o P. M.—San Francisco, Calif.

Mrs. Bette Schware
3804 Colonial
Dallas, Texas

Tuesday—June 20, 1944

Dearest Bette:

Read the clipping you enclosed in the letter I received yesterday. In return am sending one back. The FEPC is one of the most important of Roosevelt's win the war agencies. It has helped to break down the reactionary barrier that relegated Negroes to the unskilled, most dirty jobs at the lowest wages, in order to allow them to contribute their labor to increasing production for victory. Thousands of them now perform skilled labor in many industries that they never had a chance of entering before Roosevelt established the FEPC.

White supremacy is a tool of the Southern bourbons to [fol. 101] continue in power at the expense of the welfare of the South itself and the nation as a whole. It is on a par with Hitler's attempt to delude the German people into believing that they are Aryan supermen.

You yourself know intimately of the evil: Anti-Semitism. You know that the Jewish people thruout the ages have made important contributions to the cause of progress. Jim Crow is on a par with Anti-Semitism, anti-Catholicism, anti-Communism. In a democracy one cannot discriminate against a minority. When one does, consciously or unconsciously they are playing Hitler's game, making use of his favorite tactics to divide us, certainly not contributing to National Unity which is so important not only for winning the war in the shortest period of time, but also for the winning of a just peace and making this world a better place to live in for all.

All the above anti's I mentioned are most dangerous and stupid mistakes for Americans to make. They violate

Christian ethics as well as all other ethical principles that recognize the brotherhood of man. To top it all off, consider them immoral.

Now that much to my surprise I went into what could be called polemics, let me go back to reality. Enclosed find check for \$25 that I mentioned in previous letters. Finally got it back from finance.

My turn to clean machine guns this morning. Afternoon spent in washing clothes. System, boil them in a can first, after you have solved the problem of starting a fire, then rinse in creek, then soap once more then rinse and hang out to dry. A real chore but most welcome unless one wants to walk around smelling bad from sweat all the time.

Sweetheart this is all I have time for to-nite. Things to do.

Love you. Go ahead and ask all the thousand and one questions you want to. Hang the repetition. 'Tis you speaking and you can repeat a million and one times and I'll answers always.

Truly very much in

Love: (S.) Rudy.

APPLICANT'S EXHIBIT 9

PFC R. Schware—35542045
Co. G—187th Gli. Inf.—APO 468
c/o P. M.—San Francisco, Calif.

Mrs. Bette Schware
3804 Colonial
Dallas, Texas

[fol. 102]

Tuesday, June 30, 1944

Hi Blue Eyes:

Don't worry about the stationary. When a man has letters to write, especially to a honey of a gal, then anything goes. Just so long as he gets his message across.

Received your letter of June 4th today. Surprised that by then you hadn't already been notified that I had reached my destination safely. Something wrong somewhere. Hope

that by this late date you have received some of my letters. Otherwise you have plenty of justification for saying you have been deserted. Have no fear beautiful that's something that will never never happen.

Have a request to make. May sound strange but isn't. We have a young kid in the platoon, hails from San Bernardino, Calif., age 20, hair slick, on the thin side, of Spanish extraction or could be Mexican, ne, Frank M. Herrera, who very seldom receives any mail. Gives him a sort of down in the mouth expression.

Now for the request. Could you find a couple of gals who are willing to sacrifice 15 or 20 minutes of their time each week to write to him? His favorite pin-up gal, Heddy Lamar. Oh the things that war makes a man do. Will judge the results a month and a half from now.

Went up to see Ernie & Thomas to-nite. Were out, so had the 2 mile walk as exercise. Left a message tho for them to come down and repay a visit. Besides want to know what you wrote to them.

Hey, wife, when am I gonna hear that my favorite "Chin-Up Gal" is sending me that long awaited picture to cheer his lonely hours and of course, vain little me, to make the other fellows sigh with envy. You are a delicious dish of femininity if I do say so myself.

Now here's one for you. Don't envy anyone who has to read my handwriting. For the first time a few of the words you have written cannot be deciphered on this end. Here 'tis. "Am mailing the Sunday funnies—will mail the O M Greadag Tuesday which is when the stand gets it in." ?

Really surprised to hear that the male shortage has reached such alarming proportions that you gals are reduced to robbing the cradle. 9 and 10 years old! My, dear, did you?

The two songs were played over and over and over again on the trip across. Are catchy. My favorite is still "Happy, happy, wedding day". "Oh What a Beautiful Morning". Really was that memorable day.

Will write you tomorrow during lunch hour. Otherwise sort of got a hunch the first day will go by without my writing to you.

The unknown admirer is glad you like the flowers. With your assistance, sending checks, will be a weekly occurrence for the duration. When he gets home, no doubt will deliver them in person. Then you'll find out who he is. [fol. 103] Happy in the knowledge you like them.

Take good care of yourself Bette. Don't blister too much from the sun the way I did.

Regards to all. No time for more now.

A thousand and three kisses. A hug. And you can bet your boots I'll attempt to dance your feet off.

Love You Very Much, (S.) Rudy.

PS This is a request for a package. Could you buy me a couple of wrist watch bands in the P. X. (leather)? Irreplaceable here and mine is starting to wear out fast. Enclose whatever else you want to in the package. Would do the same for you if our positions were reversed.

Liked the verses and joke. Sure intend to take good care of myself.

(S.) R.

APPLICANT'S EXHIBIT 10

15 July 1954

To Whom It May Concern:

The undersigned has known Rudolph Schware from September, 1950, when we entered the law school of the University of New Mexico, to the date hereof. I have never known him to commit or to participate in an immoral or unmoral act. To the best of my knowledge he is a person of good moral character and I believe him to be of good moral character.

Respectfully, (S.) Heister H. Drum, Heister H. Drum.

{fol. 104]

July 12, 1954

To Whom It May Concern:

I have known Mr. Rudolph Schware since September of 1950, at which time we entered the College of Law at the University of New Mexico.

During this time I saw Mr. Schware almost daily as a student and upon occasion socially. During this time it was my impression that Mr. Schware was of very high moral character, and that he possessed a high degree of integrity. This is still my impression at this writing.

(S.) Julián S. Ertz, Julian S. Ertz.

410 Martinez Lane N. E.

July 13, 1954

To Whom This May Concern:

I have known Mr. Rudolph Schware for two years and have become intimately acquainted with him. His moral character in my opinion is far and beyond the highest standard of any person I have ever come in contact with. His word is his bond.

Sincerely yours, (S.) Felix Martinez, Felix Martinez.

July 15, 1954

To Whom It May Concern:

This is to state that I have known Mr. Rudolph Schware as a student at the University of New Mexico College of Law for a period of three years, during said period Mr. Schware has conducted himself as a person of good moral character; that using said period as a basis for my opinion he is a person of good moral character and is possessed of ability to qualify him to follow the profession of [fol. 105] law.

(S.) Terrance L. Dolan, Terrance L. Dolan, Attorney at Law.

1709 Cagua Dr., N. E.
Albuquerque, New Mexico
July 12, 1954

To Whom It May Concern:

I have known Rudolph Schware for the past 3½ years, and as far as I know he is of good moral character. He appears to be a quiet and respectable man.

Sincerely, (S.) Mrs. S. C. Lefton, Mrs. S. C. Lefton.

July 15, 1954

To Whom It May Concern:

This is to state that I have known Mr. Rudolph Schware as a student of mine at the University of New Mexico College of Law for the past two years; that during this time, he has conducted himself as a person of good moral character; and that based on my knowledge about him, it is my considered and sincere opinion that he is a person of good moral character, qualified to be admitted to the practice of law.

(S.) Henry Weihofen, Henry Weihofen, Professor of Law.

July 15, 1954

To Whom It May Concern:

This is to certify that I have known Mr. Rudolph Schware for over three years. I have had business relations with him and have always found him to be absolutely honest and trustworthy. I know, for a fact, that he is a person of the highest and best moral character. His word can be relied on.

(S.) Cecil Young, Cecil Young, Service Enterprises.

December 13, 1952

Daily People's World,
590 Folsom St.,
San Francisco 5, California

Gentlemen:

One of your readers thought it would be nice if I received a one year gift subscription to your newspaper. They must have therefore expended the money to enter such a subscription in my name for a period starting December 9, 1952, and expiring December 10, 1953.

This is to notify you that I have no desire to have my name on your mailing list as a subscriber to your paper. I would appreciate it if you would therefore remove my name from your mailing list at your earliest convenience.

Yours truly, Rudolph Schware.

July 16, 1954

To Whom It May Concern:

I have known Rudolph Schware since September of 1950. We were classmates at the University of New Mexico Law School.

To the best of my knowledge, Mr. Schware is known to be honest, trustworthy of good moral character.

(S.) Louis B. Ogden, Louis B. Ogden.

[fol. 107]

Albuquerque, New Mexico

July 16, 1954

To Whom It May Concern:

I have known Mr. Rudolph Schware since the fall of 1950. I have had business dealings with him; I know him personally. I know Mr. Schware to be open-handed, charitable toward others, and scrupulously honest in every situation. Were he to represent me, I should have every confidence in his integrity.

(S.) Julia R. McCulloch, Mrs. Silas A. McCulloch.

NEW MEXICO
BUILDING AND CONSTRUCTION TRADES COUNCIL

Albuquerque, New Mexico
 July 16, 1954.

To Whom it may concern:

This is to certify that I have known Mr. Rudolph Schware for the past eight months and that he is Business Agent for the Linoleum Layers Local Union #1665 in the State of New Mexico.

I have known and talked to Mr. Schware both on and off the job during these months and find him to be a trustworthy upright citizen and so far as I know, good moral character.

Sincerely yours, (S.) R. D. Chitwood, R. D. Chitwood, Business Representative.

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July 16, 1954

To Whom it May Concern:

I have known Mr. Rudolph Schware fore one year and a half and during this time, I have come to know him well. In my dealings and other personal contact with him, I find him honest, trustworthy and his character to my estimation is above reproach.

Elia Mosesso. (S.) Elia Mosesso.

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[fol. 108]

July 15, 1954

To Whom it May Concern:

I have known Mr. Rudolph Schware for the past two years, during which time I was Office Secretary for the Linoleum Layers Local Union #1665, and as far as I know, he is of good moral character.

Sincerely, (S.) Ruby B. Quillen.

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July 16, 1954

To Whom It May Concern:

This is to certify that the undersigned has known Mr. Rudolph Schware as a student at the College of Law here at the University of New Mexico for three years. During this time Mr. Schware has conducted himself as a person of good moral character and on the basis of his work with us here I believe him to be qualified to be admitted to the practice of law.

(S.) Arie Poldervaart, Arie Poldervaart, Associate Professor of Law.

July 16, 1954

To Whom It May Concern:

I have known Mr. Rudolph Schware as a student in the University of New Mexico College of Law for over two years. During this time he has conducted himself as a person of good moral character. On the basis of the information I have available, I believe him to be qualified to be admitted to the practice of law.

(S.) John A. Bauman, John A. Bauman, Associate Professor of Law.

[fol. 109]

July 16, 1954

To Whom It May Concern:

This will certify that I have known Mr. Rudolph Schware as a student in the University of New Mexico College of Law for over three years. During this time he has conducted himself as a person of good moral character. It is my opinion that he is qualified to be admitted to the practice of law.

(S.) Robert Emmet Clark, Robert Emmet Clark, Associate Professor of Law.

In The Supreme Court of New Mexico

Filed

Aug 25 1954

Lowell C. Green, Clerk

[fol. 110] **IN SUPREME COURT OF NEW MEXICO**

RESPONSE TO PETITION AND TO ORDER TO SHOW CAUSE
Respondent, Board of Bar Examiners of the State of
New Mexico, states:

First Defense

1. With respect to the introductory paragraph of said Petition, respondent admits that this Honorable Court has plenary and inherent jurisdiction to regulate the practice of law and to review the decision of the respondent in this case, subject to the rules of law governing such reviews.

2. The respondent admits the allegations of paragraph 1 of the Petition.

3. With respect to paragraph 2 of the Petition, respondent is unable to admit or to deny the same since it has not complete information as to the matters therein referred to; further, that respondent has not made any claim that petitioner answered any questions in his application other than fully and accurately; nor is the respondent's decision in the petitioner's case based upon any such claim.

4. The respondent denies the allegations of paragraph 3 of the Petition and to the contrary states that the petitioner has not fulfilled all the conditions and requirements established for permission to take the bar examination for the reason that he has not satisfied the respondent of his good moral character as required by Rule I(1) and Rule III(7) of the Rules Governing Admission to the Bar of [fol. 111] the State of New Mexico.

5. Respondent admits the allegations of paragraph 4 of the petition.

6. With respect to paragraph 5 of the Petition, the respondent admits that the petitioner was given an informal hearing as alleged and that following said hearing,

the petitioner was advised that he was not entitled to take the bar examination. The respondent is unable to admit or deny that the answers then given by the petitioner at said informal hearing were full, complete and true as alleged in said paragraph for the reason that respondent has no information touching said matters other than supplied by the petitioner himself. Further, that respondent has not made any claim that said answers were not full, complete and true, nor has respondent based its decision in the case of petitioner upon any such claim.

7. With respect to paragraph 6 of the Petition, respondent admits that no transcript of the testimony was taken at said hearing, but denies that no record of said meeting was kept; and to the contrary alleges that the following minutes of the action then taken by the respondent were duly recorded by the secretary of the respondent:

"No. 1309 RUDOLPH SCHWARE. It is moved by Board Member Frank Andrews that the application of Rudolph Schware to take the bar examination be denied for the reason that, taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed."

Further that said minutes were a matter of public record available for the inspection of the petitioner upon their being prepared after said meeting of the respondent on [fol 112] February 22, 1954; and that petitioner was fully cognizant of the matters discussed with him and in his presence at said meeting, said matters being the identical matters referred to in the minutes hereinabove quoted.

8. Respondent admits the allegations in paragraphs 7, 8 and 9 of the Petition.

9. With respect to paragraph 10 of the Petition, respondent admits that the quoted portion of the minutes of the respondent were read to the petitioner at the hearing on July 16, 1954, and denies the remaining allegations of said paragraph 10; and to the contrary states that the petitioner

knew of the nature and basis of the respondent's ruling prior thereto and further had access to the quoted minutes of the respondent since shortly after February 22, 1954, said minutes being a matter of public record in the office of the Clerk of the Supreme Court of New Mexico.

10. With respect to paragraph 11 of the Petition, the respondent admits the allegations thereof as being part of the truth, and to make said paragraph state the whole truth touching the subject matter of said paragraph the respondent further, states: that the petitioner and his counsel were allowed to examine all relevant *public* records of the respondent; that certain records of the respondent consist of the answers to inquiries made concerning applicants for admission to the State Bar of New Mexico; that these inquiries are made by the respondent and answered by informants upon the express understanding that all information so given by such informants shall be held in strict confidence by the respondent; that this procedure is expressly consented to by applicants for admission to the State Bar, and was expressly consented to by the petitioner the State Bar on the basis of such confidential information [fol. 113] in this case. Further, that the respondent does not reach a decision upon applications for admission to so obtained and did not do so in the case of the petitioner, in this cause; that the bases of the decision of the respondent in the petitioner's case here sought to be reviewed are not to be found in such confidential information and that said decision of the respondent in the petitioner's case is based upon facts disclosed by the petitioner himself.

11. With respect to paragraph 12 of the petition, respondent denies that the matters therein referred to satisfied the respondent that the petitioner was of good moral character and admits the other allegations thereof.

12. Respondent admits the allegations of paragraph 13 of the Petition.

13. Respondent admits the allegations of paragraph 14 of the Petition.

14. With respect to paragraph 15 and the twelve subparagraphs thereof, the respondent denies the truth, the materiality and legal sufficiency of all and every allegation therein contained.

Second Defense

1. Respondent is charged with the responsibility under N. M. S. (1941 Comp.) S. 18-108, as amended, and the Rules Governing Admission to the Bar of the State of New Mexico of examining candidates for admission to the Bar as to their qualifications and to recommend such as fulfill the same to this Honorable Court for admission to practice. An essential qualification of any applicant for admission is that he be of good moral character. It is provided by Rule III(7):

[fol. 114] "That the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character."

2. The respondent has conducted two hearings touching the moral character of the petitioner, one on February 22, 1954, of which no transcript of testimony has been preserved which resulted in the resolution quoted in paragraph 7 of the First Defense hereinabove stated. The other hearing was held on July 16, 1954, and of this meeting a transcript of testimony has been preserved and a copy thereof is made a part of the record herein by paragraph 12 on page 4 of the Petition.

4. The information obtained at both of said hearings and the information upon which the respondent acted in reaching the decision here sought to be reviewed, is reflected in the transcript of the special meeting of the Board of Bar Examiners held Friday, July 16, 1954. Based upon said evidence, the respondent believes that the resolution it adopted at its meeting of February 22, 1954, and affirmed at its meeting of July 16, 1954, is in all respects lawful and proper and that "the application of Rudolph Schwere to take the bar examination (should) be denied for the reason that taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico."

Wherefore having fully answered the allegations of the Petition, the respondent prays that the Petition be dismissed and the Order to Show Cause discharged.

[fols. 115-173] ———, Attorney General of New Mexico; (S.) Richard H. Robinson, Richard H. Robinson; Attorney General; (S.) Fred M. Standley, Fred M. Standley, Assistant Attorney General; (S.) William A. Sloan, William A. Sloan, of counsel for defendant, Box 558, Albuquerque, New Mexico.

Duly sworn to by Bryan G. Johnson. Jurat omitted in printing.

[fol. 174] IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

In the matter of the application of RUDOLPH SCHWARE for admission to the bar of the State of New Mexico.

PETITION AND AFFIDAVIT TO TAKE BAR EXAMINATION—
Filed January 4, 1954

To the Honorable Chief Justice and Justices of the Supreme Court of the State of New Mexico:

Pursuant to the rules which are applicable I hereby respectfully petition your honorable Court for an order admitting me to practice law in all the courts of the State of New Mexico.

* Permission is respectfully requested to take the bar examination to be held in Santa Fe, New Mexico, on February 22, 1954.

*Strike the language which is not applicable. Use typewriter in filling all blanks.

Application fee in the sum of \$75.00 is enclosed herewith.

I will appear at the next meeting of the Board of Bar Examiners and report to the secretary thereof in the office of the Clerk of the Supreme Court, Supreme Court Building, Santa Fe, New Mexico, at 8:30 o'clock A. M. on Feb. 22, 1954 (See Paragraph 1, Rule III.)

My address is 841 Madeira Drive, S. E., Albuquerque, New Mexico.

As exhibits to this petition I am attaching: (See Par. 7, and 8 of Rule II and Par. 3 of Rule IV.)

Material facts in support of this petition are shown by my answers to the following questionnaire.

(Instructions to the Applicant—All statements are to be based on your own knowledge unless the statement is expressly qualified to show the source of your information. Answer all questions and make your answers as specific as possible. If the space for any answer is insufficient, you may complete your answer on a separate attached sheet.)

1. State:

(a) Full name: Rudolph Schwarc.

(b) Have you ever been known by any other name or surname? Yes; if so state and give details: See attached Sheet, Page 1.

(c) Are you a citizen of the United States? Yes.

2. Date and place of birth: January 23, 1914; New York, N. Y. Age: 39.

3. State every residence you have had since you were sixteen years of age.

City and State, Street No., From (Mo. and Yr.), To (Mo. and Yr.). See attached sheet, Page 2.

4. (a) Give the date when, and the address where, you established residence in New Mexico. July 17, 1950 at Schwartzman Apts., South 2nd St., Albuquerque.

(b) State the address of each place in New Mexico where you have lived since that date and the period of residence at each address giving the day, month and year in each instance. From July 17, 1950 to Sept. 14, 1950 at Schwartzman Apts., South 2nd Street, Albuquerque; from Sept. 15, 1950 to the present at 841 Madeira Drive, S. E., Albuquerque.

(c) If you have been absent from the State of New Mexico since first establishing residence state the time of each absence giving day of month and year: None.

5. My education was received as follows:

(a) High School (Name, location): DeWitt Clinton, Bronx, New York.

Dates of attendance: From 1928 to 1932.

(b) College or University other than law study (Name, location):

Dates of attendance: From To

(If you did not attend a college, so state) See attached sheet, page 3 (C).

Degrees: When

(c) Law Study:

Law Schools (Name, location): University of New Mexico, College of Law, Albuquerque, New Mexico.

Dates of attendance: From September, 1950 to January, 1954.

Degrees: (What degrees and dates)

I expect to complete the requirements for degree of Bachelor of Laws in January, 1954.

(d) Law Office Study:

Dates: From To None.

6. Make a complete statement of your practice of law since first being admitted to practice in any jurisdiction. Include temporary or part-time work. State as to each employment or period of private practice:

(a) The periods during which you were employed as an attorney or engaged in private practice with the dates.

(b) The exact addresses of the offices or places at which you were so employed or engaged and the names and present address of all such former employers, partners or associates, if any.

(c) The nature and extent of your duties or practice.

(d) The reason for the termination of each employment or period of private practice.

7. Make a complete statement of all employments you have had or business or occupations in which you have been engaged on your own account, since you became sixteen years of age, other than as set forth in question 6. Include temporary or part-time work. State as to each employment, business, or other occupation:

(a) The periods during which you were so employed or engaged with the dates.

(b) The exact addresses of the offices or places at which you were so employed or engaged with the names and present addresses of all such former employers, partners or associates in business, if any.

(c) The position held by you.

(d) The reason for the termination of each employment, business or other occupation. See attached sheet, (D), pages 3, 4, 5.

[fol. 175] 8. Have you ever held any judicial office? Give facts: No.

9. (a) Have you ever held a license, other than as an attorney at law, the procurement of which required proof of good character (i.e., certified public accountant, patent attorney, real estate broker, etc.)? Yes.

(b) As to each license, state the date it was granted, and the name and address of the authority issuing it. See attached sheet, (E), page 6.

(c) State every application presented and examination taken by you for a license granted by the state or for an official position, the procurement of which required proof of good character. (Specify all examinations whether or not you were successful. Specify every application presented including applications for reinstatement and withdrawn applications and whether or not they were granted.) State as to each application the date, the name and address of the authority to whom it was addressed, and the disposition made of it, with the reasons therefor, and as to each examination the result thereof. None.

10. Name all jurisdictions and courts in which you have been admitted to practice law. Give dates of admission to practice. None.

11. State every application for admission to the bar by you **EXCEPT** those covered by your answer to question 10. None.

12. Have you been entitled to practice in each of the locations specified under question 10 and before each court continuously from the date you first became so entitled until the date hereof? If not, state the dates during which you have not been so entitled, the nature of the disqualification, the facts, and the name and address of the person or body in possession of the record thereof. No.

13. Have you been disbarred, suspended from practice, reprimanded, censured, or otherwise disciplined as an attorney or member of any profession or organization, or holder of any office, or have any charges ever been made or filed or proceedings instituted against you?

If so, state the dates, the facts, the disposition of the matter, and the name and address of the authority in possession of the record thereof. No.

14. If you have been previously admitted to the bar, state the exact names and locations of courts before which your former practice of law was chiefly conducted. Name — Location —.

15. Have you ever held a bonded position? Yes.

If so, specify nature of position, dates, amount of bond and whether or not anyone ever sought to recover upon your bond or to cancel the same. State facts fully, including the name of the bonding company, if any. See attached sheet, (F), page 6.

16. Were you ever dropped, suspended, or expelled from school or college? Yes. If so, state facts fully. See attached sheet, (G), page 6.

17. (a) Have you ever been a party to or had or claimed any interest in any civil proceedings? Yes.

(b) Have you ever been charged with or arrested for a violation of any law? Yes.

(c) Have you ever been charged with fraud, formally or informally, in any civil proceeding? No.

(d) Have you ever been declared a ward of any court? No.

(e) Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court? No.

Give full details for (a), (b), (c), (d), and (e), including dates, the court if any, reference to the court record if any, the facts, the disposition of the matter; and if no court records are available, give to the best of your ability the names and addresses of all persons involved, including counsel. Re: (a). See attached sheet, pages 7, 8. Re: (b). See attached sheet, page 9.

18. Are there any unsatisfied judgments against you? No.

If so, state the same, giving names and addresses of creditors, amounts, dates and nature of judgment.

19. State names and addresses of three persons in each locality where you practiced law with whom you are personally acquainted. (If you have not practiced previously, give the same information for each locality in which you have lived.)

Name	Address
------	---------

Occupation

20. Give the names and addresses of three attorneys and two clients who know you. These should be other than those supporting your application or named above. (If you have not practiced previously, give the names of law school professors, etc.)

Name	Address
------	---------

Occupation

21. Give the name and location of each bar association of which you are or have ever been a member.

STATE OF NEW MEXICO,
County of Bernalillo, ss.:

Rudolph Schware, being duly sworn, says: I have read the foregoing questions and have answered the same fully and frankly. The answers are complete and are true of my own knowledge.

(S.) Rudolph Schware, (Seal)

Subscribed and sworn to before me this 18th day of December, A. D. 1953. Notary Public. (S.) Cecil E. Young, My Commission expires April 16, 1955.

[fol. 176] IN THE SUPREME COURT OF THE STATE
OF NEW MEXICO

No. _____

In the Matter of the Application of RUDOLPH SCHWABE for
Admission to the Bar of the STATE OF NEW MEXICO

A

Re: 1 (b).

In September, 1933, I went to work in a pocketbook factory located at Middletown, New York. I wanted to organize the employees into a union. Because a large number of employees were Italian, I was of the opinion that union organization work would be facilitated if I adopted an alias.

I used the alias, Rudolph De Caprio while employed at this factory. When the workers were organized into a Local Union affiliated with the American Federation of Labor, I left for my home in New York City and resumed use of my real name.

The following year, 1934, I left New York City to take up residence in California. During the entire period of my residence in that state, from 1934 until 1937, I again used the alias, Rudolph De Caprio.

During the maritime strike in 1934 I was arrested on a number of occasions and was booked under the alias of Joe Fliari.

[fol. 177]

B

Re: 3.

To the best of my knowledge and believe I have lived in the following cities. Where addresses are not given, it is only because I cannot remember them.

City and State	Street No.	From	To
1. Bronx, New York	Amalgamated Co-operative Apts., Apt. P 3	Jan. 1930	June 1933
2. Middletown, New York	Unknown	Sept. 1933	Nov. 1933
3. Bronx, New York	Amalgamated Co-operative Apts., Apt. P 3	Nov. 1933	Feb. 1934
4. Los Angeles, California	Westerly Terrace	Feb. 1934	Mar. 1934
5. San Pedro, California	Unknown	Mar. 1934	Mar. 1936
6. San Francisco, California	Unknown	Apr. 1936	Oct. 1936
7. Berkely, California	Unknown	Nov. 1936	Feb. 1937
8. Bronx, New York	Amalgamated Co-operative Apts., Apt. P 3	Feb. 1937	May 1937
9. Chicago, Illinois	Unknown	May 1937	Sept. 1937
10. Rio Hondo, Texas	Unknown	Sept. 1937	Nov. 1937
11. Detroit, Michigan	Unknown	Nov. 1937	June 1940
12. South Bend, Indiana	Unknown	June 1941	Nov. 1941
13. South Bend, Indiana	129 So. Carroll Street	Oct. 1941	July 1942
14. South Bend, Indiana	Unknown/	July 1942	Jan. 1943
15. U. S. Army		Jan. 1943	Feb. 1946
16. South Bend, Indiana	2222 Longley Avenue	Mar. 1946	Mar. 1949
17. Kalamazoo, Michigan	738 Stockbridge Avenue	Apr. 1949	June 1950
18. Albuquerque, New Mexico	Schwartzman Apts. South 2nd Street	July 1950	Sept. 1950
19. Albuquerque, New Mexico	841 Madeira Dr. SE	Sept. 1950	Still there

[fol. 178]

C

Re: 5 (b).

1. City College of New York, New York, New York.
From February 1932 to March 1932.

2. Western Michigan College of Education, Kalamazoo,
Michigan. From September 1948 to June 1950.

D

Re: 7.

To the best of my knowledge and belief the following
is a true statement of my employment. I do know that
there are certain gaps in employment which I cannot recall.
There were also periods in which I was unemployed.

1. 1930 to 1932, while attending High School, I had
part time employment delivering milk in the mornings. I
do not recall the name of the company for which I worked.
Deliveries were made in the Amalgamated Cooperative
Apartment Houses in the Bronx, New York. Quit.

2. 1930 to 1932, while attending High School, I worked
in a produce store after school hours, on Saturdays and
Sundays full time. I do not recall the name of the store
or the owner. Quit.

3. 1932 to 1933. I was employed part time in Columbia University Library, New York City. I believe I was laid off for economy reasons.

4. June to September, 1933. I was employed as a chauffeur at a summer resort hotel in the vicinity of Monticello, New York. I cannot recall the name of the hotel. Laid off at the end of the season.

[fol. 179] 5. September to November 1933. I was employed in a pocketbook factory in Middletown, New York. I cannot recall the name of the factory. I worked under the alias of Rudolph Di Caprio. I did not return to work when the strike ended.

6. March, 1934 to November, 1935. I was employed as a machinist's helper at Bethlehem Shipbuilding Company, Terminal Island, San Pedro, California, under the alias of Rudolph Di Caprio. I do not recall the names of my superiors. I left this work in order to join the merchant marine.

7. December, 1935 to April, 1936. Shipped out as an ordinary seaman on a freighter. I do not recall the name of the ship but believe I worked for the Calmar Line under the alias of Rudolph DiCaprio. I left this employment to sail on a steam schooner plying the Pacific Coast. I quit because I finally realized my place was not sailing the high seas but on land.

8. April, 1936 to February, 1937. I was employed part time as a longshoreman and a warehouseman, under the alias of Rudolph Di Caprio, on the docks in San Francisco, Oakland and Berkeley. I left because my father died and returned to New York City.

9. May, 1937 to September 1937. I was employed part time in a small grocery store. Left because I could not earn enough. I cannot recall the name of the store or the owner.

10. September, 1937 to November, 1937. I was employed at 20¢ an hour in a vegetable processing plant in Rio Hondo, Texas. I do not recall the name of the plant or the owner.

11. March, 1938 to February, 1940. I was employed as Secretary of the Wayne County Workers Alliance. The

offices were located on Grand River Avenue in Detroit, Michigan.

[fol. 180] 12. February, 1940 to June, 1940. I was employed as State Secretary of the Michigan Workers Alliance. The offices were located on Grand River Avenue in Detroit, Michigan. I voluntarily terminated my employment because of basic disagreements as to policy.

13. Part of the time, see #12, supra, I was employed on the W. P. A.

14. From June, 1940 to June, 1941. I was self employed doing odd jobs and unemployed part of the time.

15. June, 1941 to November, 1941. Employed as a tow bar driver by Caravan's, Inc., Studebaker Corporation, South Bend, Indiana. Firm went out of business when the 1942 car production was halted.

16. February, 1942 to January, 1943. I was employed as a truck driver by Fitterling Transportation Co., Homer W. Fitterling, owner, offices at 430 South Carroll Street, South Bend, Indiana. I left to go into the service.

17. January, 1943 to February, 1946. U. S. Army. Honorably discharged.

18. March, 1946 to May, 1946. Employed as a truck driver by Shipper's Dispatch, Inc., offices at 1216 West Sample Street, South Bend, Indiana. I do not recall the name of the owner. I left in order to go into business for myself.

19. May, 1946 to the present. Self employed as owner of the Advance Sales Company, main line of business the sale of venetian blinds, present address, 841 Madeira Drive, S. E., Albuquerque, New Mexico.

[fols. 181-183]

E

Re: 9 (b).

Real Estate Broker's License, issued by the New Mexico Real Estate Board, 105 Fourth Street, S. W., Albuquerque, New Mexico. First issued approximately June 1, 1951 and subsequently renewed yearly on January 12, 1952 and January 1, 1953.

F

Re: 15.

I am bonded as a licensed real estate broker in the amount of \$1,500.00. The bond is handled by the Bender and Padon Insurance Agency, 5005, Central Ayenue, N.E., Albuquerque, New Mexico. No one has ever sought to recover on my bond and no bonding company has ever sought to cancel same. The bond has been in effect continuously since June 1, 1951.

G

Re: 16.

1. In my senior year in De Witt Clinton High School, I was suspended for a period of approximately three days for refusing to give up membership in one of the high school clubs whose slate in the school elections had won.

2. I dropped out of City College of New York, New York, because of financial reasons, without completing the first semester. I do not know whether or not I was suspended from the rolls.

.

[fol. 184] Re: 17 (b).

1. In 1934, I cannot recall the exact dates, I was arrested on several occasions during the maritime strike of that year. I was booked under the alias of Joe Fliari on a charge of "Suspicion of criminal syndicalism". I never appeared before a judge. On one occasion I was detained in the San Pedro jail for approximately five days although the authorities were not supposed to be able to hold you on this charge for more than seventy hours. I was not represented by counsel. I believe the record of these arrests can be found in the San Pedro courthouse.

2. On February 6, 1940, I was arrested in Detroit, Michigan, by members of the Federal Bureau of Investigation. I had been indicted by a Federal Grand Jury on charges of violating a law passed in 1812 which made it a crime to recruit soldiers for a foreign country in the United States. Specifically I was charged with recruiting soldiers for the legal Spanish Republican government to fight against Gen-

eral Franco and his German and Italian allies during the Spanish Civil War. I was lodged in the Milan Federal Penitentiary for a period of ten (10) days. I was released because the United States government decided to nolle pros the charges. I was represented by counsel from Maurice Sugar's office in Detroit, Michigan.

3. Sometime in 1940 or 1941, I cannot remember the exact date or even the name of the town in Texas where the event occurred I was arrested on a charge of "suspicion of transporting a stolen vehicle". I had been asked to pick up a car which had been damaged and deliver the same to the owner in Los Angeles, California. I had all the papers in my possession which showed my agency for the owner. After seventy hours incarceration I was finally released. During this entire time the authorities refused to allow me to contact the owner of the vehicle even though they knew who he was. A Kangaroo Court was conducted in the jail and the other inmates attempted to get my funds away from me without success.

4. Although I have been arrested on a number of occasions I have never been convicted of any crime. During the 1934 maritime strike hundreds of strikers were similarly arrested.

[fol. 184A-191] IN SUPREME COURT OF NEW MEXICO

APPLICATION FOR CHARACTER REPORT

I, Rudolph Schware, hereby apply for a character report in connection with my application for admission to practice law in the State of New Mexico. I understand that I will not receive and am not entitled to a copy of the report nor to know its contents. I agree to give any further information which may be required in reference to my past record and consent to having this investigation made and such information as may be received reported to the examining authority.

(S.) Rudolph Schware, 841 Madeira Drive, S. E.,
5-7346, Albuquerque, New Mexico.

OPINION.

McGhee, J.

This matter is before us on a pleading we treat as a petition to review the action of the State Board of Bar Examiners in denying the application of Rudolph Schware to take the examination for admission to practice law in this state.

In December, 1953, the petitioner applied for leave to take the bar examination in February, 1954. He was advised by letter that he would be entitled to do so. When he presented himself for examination he was interviewed by the Board of Bar Examiners. No transcript was made of this interview, but at its close the following action was taken by the board:

"No. 1309, Rudolph Schware. It is moved by Board Member Frank Andrews that the application of Rudolph Schware to take the bar examination be denied for the reason that, taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed."

A second hearing was held before the board on July 16, 1954, and transcript made thereof. At the conclusion of this hearing the board was of the unanimous opinion the former determination should stand.

It is agreed by all that this court has plenary jurisdiction to review the decision of the board. In *re* Gibson, 35 N. M. 550, 4 P. 2d 643 (1931); In *re* Royall, 33 N. M. 386, 268 P. 570 (1928). In such review this court is not limited by appellate rules, but the matter is considered originally.

The substance of petitioner's argument is made under two points, the first of which is: The right to practice law is a property right protected by the Fifth and Fourteenth

[fol. 193] Amendments of the Constitution of the United States. Under this point reference is made to the cases of *Ex Parte Garland*, 71 U. S. 333, 18 L. Ed. 366 (1866), and *Cummings v. The State of Missouri*, 71 U. S. 277, 18 L. Ed. 356 (1866). In the latter case it is said:

“ * * * We do not agree with the counsel of Missouri that ‘to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.’ The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any right, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. * * * ”

It is not necessary to class membership in the legal profession with ownership of real estate or other tangible article in order to recognize an individual has a right therein. We regard as inutile an attempt to categorize it at all. But, granting that such membership is a species of property, as that word is employed in the Constitution, it does not follow, and we do not take it as contended by petitioner, that the right to its enjoyment is absolute and unfettered by any mode of regulation.

In an annotation in 98 L. Ed. 851, at p. 852, substantive due process in its application to the type of property with which we are here concerned is described in the following language:

[fol. 194] “Substantive due process of law may be roughly defined as the constitutional guaranty that no person will be deprived of his life, liberty, or property for arbitrary reasons. Such a deprivation is constitutionally supportable only if the conduct from which the deprivation flows is proscribed by reason-

able legislation (that is, legislation the enactment of which is within the scope of legislative authority), reasonably applied (that is, applied for a purpose consonant with the purpose of the legislation itself)."

The Board acted under Rule III of the Rules Governing Admission to the Bar of New Mexico, which provides "that the Board of Bar Examiners may decline to permit any such applicant to take the (bar) examination when not satisfied of his good moral character." We do not see how this requirement, which in the same or similar language is universal in this country so far as we know (Anno: 72 A. L. R. 929), can seriously be challenged as unreasonable.

Judge Cardozo has this to say of the requirement of good moral character upon admission to the bar, and afterward:

"Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. * * * (Citing cases.) Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. * * *" In re Rouss, 221 N. Y. 81, 116 N. E. 782 (1917).

The cases are numerous too, which hold that by asking admission into the legal profession an applicant places his good moral character directly in issue and bears the burden of proof as to that issue. *Spears v. State Bar*, 211 Cal. 183, [fol. 195] 294 P. 697, 72 A. L. R. 923 (1930); *In re Wells*, 174 Cal. 467, 163 P. 657 (1917); *Rosencranz v. Tidrington*, 193 Ind. 472, 141 N. E. 58, 28 A. L. R. 1136 (1923); *In re Weinstein*, 150 Or. 1, 42 P. 2d 744 (1935).

Thus we are brought up to the controverted, substantial question before us of whether the petitioner has produced proof of his good moral character so as to entitle him to take the examination for membership in the bar of this state, as contended by him under his second point.

An examination of this sort is concerned ultimately with the subjective character of the individual. Character cannot be laid upon a table, so we must resort to two kinds of indirect evidence: First, the pattern of conduct an individual follows, and, second, a consideration of the regard his fellows and associates have for him. This investigatory technique can, at best, but dimly throw into relief the architecture of character; still, it is all we have. In this particular inquiry the technique leads us through petitioner's own disclosures to behavior which cannot be severed from a social ideology which now stands athwart so much of the Eastern World dividing men from men—Communism.

The legal status of the Communist Party in the United States is far different today from that which obtained during the years of the Depression and following, when petitioner was a member of it. He calls our attention to the fact that as late as 1948 the Communist Party was a recognized political party and had candidates for the Presidency of the United States every four years up to and including [fol. 196] 1948. We do not overlook the fact that during the years petitioner was a member of the Young Communist League and the Communist Party, from 1932 to 1940, such membership was not unlawful. But that fact does not restrain us from examining his former associations and actions, including his arrests and his use of aliases, and his present attitude toward those matters, as contained in his statements to the board, in order to arrive at a conclusion as to his character. As said in *Communications Assn. v. Douds*, 339 U. S. 382, 411, 94 L. Ed. 925, 70 S. Ct. 674 (1950), "the state of a man's mind must be inferred from the things he says or does."

It is generally held that an inquiry into character preceding admission to the bar is different from the inquiry had upon proceedings to disbar. This is already exemplified in part by our earlier reference to the rule that an applicant bears the burden of proof of good character. It is also to be noted in the scope of inquiry. It is said in *re Wells*, supra:

" . . . In a proceeding to disbar an attorney the burden is on the accuser to prove moral turpitude.

The requirement on his admission is to prevent the accrediting of untrustworthy persons as fit to receive the confidence attending upon the relation of attorney and client. The inquiry may extend to his general character as well as to particular acts. It is broader in its scope than that in a disbarment proceeding. The court may receive any evidence which tends to show his character for honesty, integrity, and general morality, and may no doubt refuse admission upon proofs that might not establish his guilt of any of the acts declared to be causes for disbarment."

Similarly, in *In re Farmer*, 191 N. C. 235, 131 S. E. 661 (1926), we find this statement:

[fol. 197] "This 'upright character,' prescribed by the statute, as a condition precedent to the applicant's right to receive license to practice law in North Carolina, and of which he must, in addition to other requisites, satisfy the court, includes all the elements necessary to make up such a character. It is something more than an absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should, or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong. . . ."

Before proceeding to examine the record as to the matters assigned by the board for its refusal to endorse the petitioner, "the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests", it should be stated that only one member of this court has looked at the contents of what might be termed the "confidential file", which contains answers to inquiries which the bar examiners cause to be mailed out regarding applicants who have not theretofore practiced law, the answers being returned to the clerk of this court, who is also the secretary of the Board of Bar Examiners.

That member is the Honorable H. A. Kiker. In making this statement the writer and the remainder of the court do not intend that any reflection should be cast upon that justice in his examination of materials not made available to the petitioner. The statement is made for the sole purpose of advising petitioner that, regardless of whether this court has power to examine and rely upon "confidential" information about an applicant for admission to the bar, on which question we make no pronouncement, its members, with the single exception noted, have chosen not to do so. Also, at the oral argument here, and in its response and brief, the board disclaims having based its decision upon such information.

As the facts before us are the history of a man, they are best stated in narrative form.

The petitioner was born in New York in 1914. His father was a needles trade worker, an immigrant, a poor man and a socialist. Petitioner began work at the age of nine and continued part-time work during his school years. He attended DeWitt Clinton High School in the Bronx, New York, from 1928 to 1932. In 1932, at the age of eighteen, he joined the Young Communist League. This association arose out of the following circumstances, as described by petitioner:

"Well, I was going to High School and a fellow I was playing handball with during school hours when we used to get an hour off told me that he had written a letter to the school newspaper dealing with the question of unemployment in the United States, that the editors of the school paper wanted to publish it but that the faculty adviser refused to allow it to be published and he said that there was a club on the campus which dealt with problems such as that and asked me to attend one of the meetings. Well, I attended one of the meetings of the club and I found out that what he'd told me was true. I thought that freedom of the press was important, I was approximately eighteen years old at the time, and I attended meetings of the club whenever I could, which wasn't too often. The club ran candidates in the school elections. This was just prior to my graduation and they had a—the plat-

form called for lower prices in the school lunch room and stuff like that and our candidates won the election.

"It was after the election that the principal called all the members of the club into his office and our faculty adviser and told us that because of the way that the campaign had been conducted that we would have to disband the club. Now I know that right after we won [fol. 199] the election they lowered the price of a glass of milk in the school lunch rooms from five cents to three cents and other foods correspondingly.

"There were a number of people who belonged to the club who belonged to various political organizations, the main ones were the Young Peoples Socialist League, that had about approximately eight or nine members and there were four who belonged to the Young Communist League. To my dying day I will never forget, we were in the principal's office and the principal says, you either—you have to disband the club or else stand suspended. And the leader of the Young Peoples Socialist League got up and he said, 'Seeing as how you put it that way, I acquess.' I never knew what that word meant until I looked it up. He meant to say, 'I acquiesce.'

"There were five people who refused to disband. Four of them were members of the Young Communist League, and myself. I thought it was wrong for the club to have to disband and it set me to thinking—I'd been raised in the socialist atmosphere—why was it when a test came, you've got to realize I was eighteen years at the time—when the test came why was it that the socialists had backed down and the Communists had stood up and I thought and thought and finally my—over the objections of my family—an invitation was given to me to join the Young Communist League and I joined the Young Communist League. It was a few years later that I joined the Communist party."

In connection with the refusal to disband the club, petitioner was suspended from school for about three days.

Petitioner joined the Communist Party in 1934 at the age of twenty.

In 1933 petitioner was employed in a pocketbook factory.

in Gloversville, New York. For the first time he used an alias. In his written application to take the bar examination he stated with regard to the alias:

"I wanted to organize the employees into a union. Because a large number of employees were Italian, I was of the opinion that union organization work would be facilitated if I adopted an alias. I used the alias Rudolph de Caprio while employed at this factory. When the workers were organized into a Local Union affiliated with the American Federation of Labor, I left for my home in New York City and resumed use of my real name."

[fol. 200] At the July, 1954, hearing, the petitioner said of the use of this alias:

"A. Well, I worked in Monticello, New York, in a hotel driving as their chauffeur and then when the work slacked—when the hotel closed down for the summer season, on the way into New York there is a town called Gloversville and had a large Italian population and practically all the people working in the factory there were Italians and in order to get a job to earn a living I changed my name from a Jewish to an Italian name and kept the same first name and was able to get a job."

Q. Was that the first time that you ever used an alias?

A. Yes.

Q. Was the sole purpose for that to gain employment?

A. Yes."

From February, 1934, to February, 1937, petitioner lived in Los Angeles, San Pedro, San Francisco and Berkeley, California, where he was employed in shipyard work, as a longshoreman and warehouseman, and part of the time as a seaman. During this period he used the alias Rudolph De Caprio.

During the maritime strike in 1934 petitioner was ar-

rested a number of times and was booked under the alias of Joe Fliari, or Fliori.

Of his use of the alias, Rudolph De Caprio in California, petitioner testified at the hearing before the board:

"Q. Why did you use the name in the shipyard?

A. The same reason, I don't know of any and I never did find any Jewish person who is working in the shipyard.

Q. Was the use of the name solely to obtain employment?

[fol. 201] A. Yes.

Q. Was there any intention to deceive anyone?

A. No."

When it was called to petitioner's attention that he had explained the original use of an alias on the basis that he would be more effective as a labor organizer in organizing workers of Italian extraction, and that at the hearing he explained the use of aliases as solely for the purpose of obtaining employment, he testified he used the aliases for both reasons.

On his use of the alias Joe Fliari, or Joe Fliori, upon his arrests, and of the circumstances of the arrests, petitioner testified:

"Q. Did you ever on any other occasion use an alias?

Q. Yes, a number of times, I believe it was two. I have tried to check with the Los Angeles Police Department and made a trip to California purposely to get the information, because the information was refused to be supplied to me by mail, to find out how many times I'd been arrested in San Pedro, California. I know definitely that I was arrested twice and this was in the course of a strike and while I was in San Pedro I went through the files of the San Pedro Newspaper and found that there were approximately two to 3,000 people arrested in the course of about 66 days, approximately, over 200 on a charge of suspicion of criminal syndicalism.

(Discussion off the record.)

Q. You were speaking about the arrest of approxi-

mately two or 3,000 people during the strikes at San Pedro, California, were you arrested at that time?

A. Yes, I—to the best—

Q. First let's stay with the name, what name were you working under in the shipyard?

[fol. 202] A. Rudy DiCaprio.

Q. And how many times were you arrested during the course of that strike?

A. To the best of my knowledge and belief twice.

Q. At that time it was—

A. Criminal syndicalism.

Q. Is that a state or federal?

A. State.

Q. What is criminal syndicalism, if you know?

A. Well, there is a statute which defines criminal syndicalism as a person—as the commission of an act in which somebody attempts to overthrow or subvert the state government, essentially that is what it is.

Q. Were you ever tried on this charge?

A. No, I was never tried on the charge.

Q. Were the charges dismissed?

A. I assume so, I was never brought before a judge, I was kept in jail, I remember one time 72 hours and then released and the second time I remember I was in jail approximately five days and read in the paper on the 3rd day that I'd been released but that I was still in jail but I'd never been brought before a judge and was released.

Q. And now sticking with the use of names, you have testified that you used the name of DiCaprio at Gloversville, New York, and at San Pedro, did you use any other alias at any time up until 1940?

A. Well, as I said, when I was arrested I used the alias of Joe Flori.

Q. Was that in connection with employment or just a name that you assumed to give to the police?

A. A name that I assumed to give to the police, I suppose, it is a long time ago, I suppose I thought, well, if the company knew that I'd been arrested it was possible that I wouldn't be able to go back to work.

[fol. 203] Q. There was no question of your identity with the police since they had you in person?

A. No, no.

Q. They had you regardless of what your name was?

A. That is correct.

Q. And did you obtain any monetary benefit as a result of that name?

A. None whatsoever."

In the Communist Party petitioner used either the name Rudy DeCaprio or Joe Flori. He could not recall which one.

In February, 1937, petitioner's father died and he returned to New York. At this time he left the Communist Party. He described this break with the Party as follows:

"Q. You say you left the Communist party in 1940. Would you tell the Committee in your own words the reason why you left.

A. Well, I'd left the Communist party once before in 1937, I believe, when my father died. I left California and went back home to New York. I dropped out of the Communist party then and that was the time when I assumed my rightful name and said to myself, why are you ashamed to be known as Rudolph Schware, the son of your father. * * *"

In the years between May of 1937 and January of 1943, petitioner worked for a short time in Chicago, then in Texas at a vegetable processing plant, then in Indianapolis picking corn. He was intermittently hitch-hiking and looking for work, and finally came to Detroit. He testified as to the time spent in Detroit as follows:

"* * * I was single at the time and the relief that the City of Detroit gave for single men was this place called Fisher Lodge, approximately 2,000, 3,000 people, and food was about as much as the city could afford at [fol. 204] that time and I was instrumental in helping to organize an organization in this lodge so that we could get better food and perhaps able to get jobs as a result of that."

In Detroit he was again approached to rejoin the Communist Party, which he did. He states of this reaffiliation:

"... my disillusionment had been going on and then you had in 1939, I believe it was, you had your Stalin-Hitler pact which began to raise a lot of questions in my mind and then in 1940 I began to see. At that time I was the State Secretary of the Michigan Workers Alliance and I began to see that the Communist party wasn't interested so much, those beautiful words wasn't so much that but a struggle for power on the part of a few individuals that they wanted the power and they didn't care what happened to the other people. Of course, I was a lot older then, I was a lot older then, too, and I'd been questioning and questioning for quite some time and finally I made the events reach the stage where the party organization was trying to say how the organization of which I was the elected secretary should be run, not for the benefit of the organization, that is when I reached the final decision, you and I part ways and I left."

Petitioner was arrested in Detroit in 1940 in connection with the Neutrality Act of 1816, when he was engaged in obtaining recruits to oppose Franco's forces in the Spanish Civil War. He had himself volunteered to go to Spain to fight, but was unsuccessful in getting passage there. He states of this arrest:

"Q. ... I want to inquire whether or not you knew at that time that you were engaged in these recruiting activities that there was any question as to their legality?

A. No, I had no knowledge whatever that I was violating a law. There was no knowledge whatsoever.

Q. Was the recruiting being conducted openly or surreptitiously?

A. Quite openly. Everybody knew that I, myself and the people in my organization and in the surroundings that I was traveling in at that time, everybody [fol. 205] knew, for instance, that I, myself, had volunteered to go to Spain but I had no knowledge what-

soever that I was breaking any law. Of course, I had read history and known of during the American Revolution people coming over from Europe to help our fight here, before we became a nation."

The charges under which he was arrested in Detroit were terminated by nolle prosequi failed on behalf of the government.

From 1940 to 1943 the petitioner had scattered employment, working part of the time as a truck driver. He was arrested in 1940 or 1941 in a town in Texas, the name of which he could not recall, on a charge of "suspicion of transporting a stolen vehicle." He stated he was driving the car to California for a friend and after being held while the police presumably inquired into the ownership of the car and his right to possession of it, he was released.

In response to a question in petitioner's written application to take the bar examination asking that he state every residence he had had since he was sixteen years of age, and indicating the name of the city and state, the street address and the period of time by month and year of each separate residence were to be given, petitioner stated that he had had ten different residences during the period March, 1934 to January, 1943, the latter date being the time he was inducted into the United States Army. He lived in California, New York, Illinois, Texas, Michigan and Indiana. He could recall only two street addresses. One was the home of his family in New York where he spent three months in 1937; the other was an address in South Bend, Indiana, where he lived approximately two years.

Another question on petitioner's application form sought [fol. 206] information as to all employments he had had since the age of sixteen years, specifically asking for the time periods of such employment, exact addresses of offices or places where employed and the names and present addresses of all former employers. From March, 1934, to November, 1935, petitioner was employed as a machinist's helper at Bethlehem Shipbuilding Company, Terminal Island, San Pedro, California. He could not recall the names of his superiors. He left there to join the merchant marine.

He then spent five months as a seaman, first on a freighter. He could not recall the name of the ship, but believed he worked for the Calmar Line, making no statement as to the whereabouts of its offices. Then he left that employment to sail on a steam schooner plying the Pacific Coast. He made no statement as to the name of his employer, or otherwise identified the schooner. After that he worked ten months as a longshoreman on the docks in San Francisco, Oakland and Berkeley, California. Then, after a trip to New York at the time of his father's death he worked in a grocery store for some four months. He could not recall the name of the store or the owner. He worked two months in a vegetable processing plant in Rio Hondo, Texas. He could not recall the name of the plant or the owner.

The application states that from March, 1938 to June, 1940, he was in Detroit working with the Wayne County Workers Alliance and the Michigan Workers Alliance. The offices were located on Grand River Avenue. He gives no names of associates. Upon leaving this work he was unemployed for a while and then became regularly employed as a truck driver in South Bend, Indiana for about [fol. 207] two and a half years. One company for which he worked went out of business when the 1942 car production was halted. He gives the name of the company, the owner and the office address of his last employer in South Bend, which corresponds with the period of time for which he had given a residence address as earlier noted. This brought him up to the time when he was inducted into the army.

The summation of all this is that for approximately nine years petitioner has provided only one residence address other than the home of his parents in New York. Over that period he has given only one personal name of an employer, for whom he also gave a completed street address in South Bend, Indiana, and only the street name for the location of the two Workers Alliances he was connected with in Detroit. This adds up to only slightly more than a complete blank. If it were not for the fact that petitioner had such a tenuous existence during those years, his inability to recall with more definiteness the location of his

residences and the names and locations of his employers would be entirely void of explanation.

Petitioner was drafted into the Army in January, 1944, and served until 1946, when he was honorably discharged. He lived in South Bend, Indiana from 1946 to 1950, during which time he was self-employed in the sale of venetian blinds and also attended Western Michigan College.

In 1950 he enrolled in the Law School of the University of New Mexico. He discussed with the dean of that school his former affiliation with the Communist Party. When questioned by one of the bar examiners at the hearing as [fol. 208] to whether it had ever occurred to him that his experience and membership in the Communist Party and his activities in that organization would affect him in his ability to be admitted to the bar, he stated:

"A. Well, I'd classify that under the heading of a calculated risk. In other words, we knew that there was a possibility that I would not be permitted to take the exam. On the other hand, we also knew that these are things that took place when I was a young person . . . I was expecting that you gentlemen will say that we have to hold a hearing on your case, Mr. Schwart. Frankly that is what I expected."

Petitioner married in 1944. He has two children. Nine letters which he wrote to his wife while in the armed services in 1944 were offered by him in evidence as corroborative of his claim to be converted from Communism and to be of good moral character. The Rabbi of a synagogue in Albuquerque testified the petitioner was a member of his congregation in good standing, that his children received religious training.

While in law school petitioner established an anonymous scholarship of \$50.00 a year to be given to needy law students, which he has continued and hopes to continue indefinitely.

Some seventeen letters from law professors and students and business associates were introduced into the record stating that petitioner is a person of good moral character, these letters being from persons who have known the petitioner in New Mexico.

Burdensome though it be to the reader, there is still more of the record of petitioner's hearing before the board which must be covered. He testified, on questions by the board members, regarding his knowledge of Communist aims and methods. This testimony is somewhat extensive [fol. 209] and we quote only part of it:

“Q. . . . Is it true or is it not true that a bona fide member of the Communist party recognizes only the Communistic authority as the authority to which he owes all allegiance, is that correct?

A. That is correct.

Q. As a Communist, in other words, a Communist who may be an American citizen, but if he joins the Communist party, his loyalty and allegiance are to the heads of the Communist party in Russia, is that correct?

A. Well, I know when I was a member of the Communist party while we looked to Russia as the guiding star, still we considered ourselves American citizens and as a legal political party. Does that answer your question?

Q. Not entirely. Let's say that I belonged to the Communist party and a directive of whatever nature it may be comes from Russia or at least where I understand is the source of words of wisdom and a certain directive comes out to a true member of the Communist party—

A. That is all.

Q. —am I under obligation, if I am a Communist, to obey that directive?

A. That is law and that is probably one of the reasons why the Communist party has been so much repudiated by the American people. We've got, just like myself, there have been hundreds of thousands of people who entered the Communist party's ranks and finally end up asking ourselves questions and starting to question why, why, and then saying to heck with you.

Q. Well, to get back to this thought that the basic concept of the Communist party is that they—it recog-

nizes no nationalistic lines, that is, if you belong to the Communist party in the United States you are the same breed of cats as one who belonged to the Communist party in Argentina or whatever that may be?

A. That is correct.

Q. And the belief is that the Communist party as such should be the controlling factor in government, is that right?

[fol. 210] A. That is the aim eventually.

Q. All right now, let's say that I am a member of the Communist Party and I am residing in the United States and you are a member of the Communist party and you are residing in Mexico. Say that a war should break out in which Russia, China, whatever countries might make the alignment, would be on the one side and the United States and other countries, including Mexico, would be opposed, and the directive would come out of Russia to me here and one to you down there to do whatever we could to aid the cause of Communistic forces that were at war with, what they would classify if Russia—

A. I have no doubt they would.

Q. —would issue that directive, if I am a true Communist and that directive would be to blow up the railroad track or something I would be advised to do it, it would be my duty?

A. I said I have no doubt.

Q. All right, if I am a Communist I follow that directive, is that correct?

A. Yes."

Throughout the record of this hearing petitioner asserts that he left the Communist Party because he was disillusioned with its leaders and further that he came to the realization that it was the individual that counted, rather than the all-powerful state advocated by Communism.

There is to us a lack of credibility in petitioner's testimony as to the extent of his disillusionment with the leaders and the philosophy of Communism, for we find in one of the letters to his wife written in 1944, four years after

his break with the Party, which his attorney offered in evidence along with others to show what was in petitioner's heart during the year they were written, these assertions:

[fol. 211] "• • • The FEPC (Fair Employment Practices Commission) is one of the most important of Roosevelt's war agencies. It has helped to break down the reactionary barrier, that relegated Negroes to the unskilled, most dirty jobs at the lowest wages, in order to allow them to contribute their labor to increasing production for victory. Thousands of them now perform skilled labor in many industries that they never had a chance of entering before Roosevelt established the FEPC.

"White supremacy is a tool of the Southern bourgeois to continue in power at the expense of the welfare of the South itself and the nation as a whole. It is on a par with Hitler's attempt to delude the German people into believing that they are Aryan supermen.

"You yourself know intimately of the evil: Anti-Semitism. You know that the Jewish people throughout the ages have made important contributions to the cause of progress. Jim-Crow is on a par with Anti-Semitism, anti-Catholicism, anti-Communism. In a democracy one cannot discriminate against a minority. When one does, consciously or unconsciously they are playing Hitler's game, making use of his favorite tactic to divide us, certainly not contributing to National Unity which is so important not only for winning the war in the shortest period of time, but also for the winning of a just peace and making this world a better place to live in for all.

"All the above anti's I mentioned are most dangerous and stupid mistakes for Americans to make. They violate Christian ethics as well as all other ethical principles that recognize the brotherhood of man. To top it all off, consider them immoral." (Emphasis supplied.)

We cannot believe that the foregoing letter is the letter of a man who four years previously had battled within himself and repudiated Communism as a quest for power by a few, as he declares to have done. No doubt the intro-

duction of this letter by petitioner was inadvertent, but it tells us what was in his heart. He would still the voice of all who would criticize Communism.

There was certainly nothing inadvertent about petitioner's membership in the Communist Party from 1934 to 1940, when he was twenty to twenty-seven years of age. [fol. 212] We agree with the Board of Bar Examiners that these are responsible years. During them his activities were largely connected with the labor movement in this country, as an organizer working out of the Communist Party. We have no reason on the record before us to credit him with a lack of knowledge of the purposes, aims and machinery of that Party in the United States.

The foundation of the Communist "theology" is laid bare in Justice Jackson's concurring opinion in *Communications Assn. v. Douds*, cited *supra*, beginning at page 422 of the U. S. report, in the following numbered statements. We omit the exposition which in the opinion follows these statements, in the interest of brevity, but commend a full reading of the entire opinion for a clear and startling picture.

"1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. . . .

"2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. . . .

"3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. . . .

"4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement. . . .

"5. Every member of the Communist Party is an agent to execute the Communist program. . . ."

(Italics omitted.)

We believe one who has knowingly given his loyalties to such a program and belief for six or seven years during a period of responsible adulthood is a person of questionable character. We do not think it an exaggeration to say

[fol. 213] that many have doubtless been denied entry into or expelled from membership in the legal profession for far less serious offenses against ethic.

We think, also that the conclusion is warranted that petitioner has erased in his own conscience any culpability attaching to the use of aliases upon the basis he thought it necessary to hide his ancestry to secure employment. He does not today appear to us to bear the weight of this deception upon his employers and the police as a dishonesty, but simply as an excusable expedient. Furthermore, he excuses his arrests in California upon the ground that many others were arrested, too. With respect to the arrest in Detroit, for activity in violation of a federal statute, we take it that he regards his work in obtaining recruits for a foreign war as even commendable because he had concluded which side was right.

On the basis of these considerations we must approve the recommendation of the Board of Bar Examiners. This board is comprised of leaders of the legal profession in this state. One of its members is a former district judge, and another is at this time a member of the Board of Governors of the American Bar Association. They are responsible, experienced attorneys. They questioned the petitioner, heard him and observed his demeanor. At a time before the formal hearing before the board, the petitioner wrote a letter to the board asking that he be permitted to appear before this court, but, on May 21, 1954, this request was withdrawn as being premature and was never renewed.

[fol. 214] We take no pleasure in the duty we have had to perform, for no man is all good or all bad. The record on which this decision is based came from the petitioner himself, who presently enjoys good repute among his teachers, his fellow students and associates and in his synagogue. But our obligation to the bar of this state knows no compromise. Petitioner has sought an office difficult to obtain and difficult to serve. The oath required of attorneys in New Mexico, based upon sec. 18-1-9, 1953 Comp., reads as follows:

"I will support the Constitution of the United States and the Constitution of the State of New Mexico;

"I will maintain the respect due to Courts of Justice and judicial officers;

"I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as (are) consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

"I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged;

"I will never reject from any consideration personal to myself the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice."

[fol. 215] To hold otherwise than we do, we would have to state that the petitioner has proved to us that he is a man of good moral character for the purpose of being given the office of attorney. We do not hold this conviction. Accordingly, it must be ruled that petitioner's application to take the bar examination of the State of New Mexico is denied.

It is so ordered.

(S.) James B. McGhee, Justice.

We concur: (S.) J. C. Compton, C. J., (S.) Eugene D. Lujan, J., (S.) Daniel K. Sadler, J.

(Kiker, J., to file dissenting opinion at later date.)

[fol. 216] IN SUPREME COURT OF NEW MEXICO

JUDGMENT—September 7, 1955

This cause having heretofore been argued, submitted and taken under advisement, and the Court being now sufficiently advised in the premises, announces its decision by Mr. Justice McGhee, Chief Justice Compton, Mr. Justice Lujan and Mr. Justice Sadler concurring, Mr. Justice Kiker dissenting by written opinion to be filed at a later date, sustaining the action taken by the Board of Bar Examiners of the State of New Mexico for the reasons given in the opinion of the Court on file;

Now, therefore, it is considered, ordered and adjudged by the Court that the application of the Petitioner to take the bar examination of the State of New Mexico be and the same is hereby denied.

IN SUPREME COURT OF NEW MEXICO

DISSENTING OPINION—September 30, 1955

Kiker, J., dissenting.

The applicant after being notified, according to the record, that he might take the examination and after having appeared on the date the examination was to begin was interviewed by the members of the Board of Bar Examiners and then told he would not be allowed to take the examination.

The reasons given by the Board for declining to allow the applicant to take the examination were contained in a motion which was unanimously carried:

[fol. 217] " . . . for the reason that, taking into consideration the use of aliases by the applicant; his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico."

After applicant had been denied the privilege of taking the examination, he wrote a letter to the Board in which he said:

" * * * If after you have reconsidered the question and your answer is still the same, I would appreciate being given an opportunity to appear personally before the Supreme Court when you certify the question to them."

Later, in the month of July 1954, the applicant was given a hearing before the Board. At this hearing the applicant testified at length, this was at Albuquerque. In addition to the applicant the following witnesses testified briefly in his behalf: Mrs. Schware, applicant's wife; Rabbi Moshe P. Mann of Albuquerque, who is the Rabbi of the Congregation B'Nai Israel; Julia R. McCulloch, secretary to the dean of the law school at the University of New Mexico; and Monroe Fox, an attorney practicing at Chama. There were also seventeen letters which applicant got from students at the law school from professors present at the University when applicant was getting together testimony as to his character.

At that hearing no witnesses appeared to show want of good character on the part of applicant. The result of the hearing was that the Board of Bar Examiners affirmed the position taken by it at the time applicant applied for the examination in February 26, 1954 and so the application stood denied by the Board of Bar Examiners until the [fol. 218] opinion of the majority was filed.

The majority, in the opinion, discusses the three reasons assigned by the Board of Examiners for refusing to allow applicant to take the examination February 26, 1954, the first of these is the use of aliases beginning more than twenty years before the date of the examination and continuing from time to time over a period of approximately eight years.

When applicant was eighteen years of age, after graduating from high school, he worked for a time in a hotel at Monticello, New York. Leaving Monticello on his way into New York city, he came to a town called Gloversville where a large part of the population was Italian and where the workers at the factory were practically all Italian. He

applied for a job and adopted the name of Rudolph Di Caprio and used that name while working there. He gave two reasons for the use of this name at different times and the majority seem to think the reasons are wholly inconsistent and show a tendency to falsehood. He explained in his application that since practically all the workers were Italian he thought in order to organize a union he would be more effective using the Italian name. He was dark and could easily pass for Italian. He stated at the hearing that he used this alias at the factory for the purpose of getting a job and did get a job working with Italians at that factory.

I do not see any great inconsistency between the two statements. Being a Jew, he must have felt as he said he did, that he probably could not get a job there and he would be unable to organize a union if he did. When [fol. 219] the workers were organized into a local union, they affiliated with the A. F. of L. after which applicant left for his home in New York City and resumed use of his own name. There is no evidence to show that the A. F. of L. failed to investigate the union before taking it into its organization as an affiliate and I have never heard of the A. F. of L. being charged with being Communist or having engaged in any subversive activities.

The statement made by applicant, as shown in the majority opinion, discloses the fact that he worked in Los Angeles, San Pedro, San Francisco and Berkeley, California from 1934 to 1937 and during that time he worked under the name of Rudolph Di Caprio. He explained this fact stating that at none of the places where he worked in shipyards, as longshoreman and warehouseman were any Jews employed. The employees were almost entirely Italian and so applicant used the name Di Caprio.

There is no hint or suggestion in the record made at the hearing given applicant in Albuquerque that he at any time used the name for the purpose of defrauding any person.

Applicant also used another Italian alias on the occasions of several arrests about which he told the Board of Bar Examiners. The name used was Joe Fliari or Joe Fiori. He told the Board that he made a special trip to California for the purpose of ascertaining the number of

times he was arrested at San Pedro. He stated that he was arrested twice in the course of a strike and that approximately three thousand people were arrested during the period of sixty-six days of the strike and that of these, two [fol. 220] hundred men, of whom he was one, were arrested on a charge of suspicion of criminal syndicalism. He had been working under the name of Rudolph Di Caprio before being arrested, but when arrested he gave the police the name of Joe Fliōri. He stated that it had been a long time since the arrest occurred and that he supposed that the reason for using that alias was fear that the company for which he had been working might not allow him to return to work. Nobody was or could have been defrauded by the use of that name. It is not shown that applicant intended to defraud anybody by its use.

In 1940 applicant was arrested in Detroit on a charge of violation of the Neutrality Act which became Federal Law in 1818 and which was revised in 1909 and now appears as Sec. 959, Title 18 U. S. C. 1952 Ed.; since 1909 the law has not changed and was in effect in 1940 and is as follows:

“(a) Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than \$1,000 or imprisoned not more than three years, or both.”

The majority opinion quotes briefly a portion of the testimony given by applicant at the close of his examination with reference to the Detroit arrest. I quote that which precedes that quoted by the majority.

“Q. You have spoken about arrests, you testified to the arrest for criminal syndicalism twice in San Pedro, [fol. 221] California, were you ever arrested on any other occasion?

A. Yes, I was arrested in 1940.

Q. Where?

A. In Detroit, Michigan.

Q. And what was the charge?

A. Well, I have attempted to obtain a copy of the indictment and the order of release and I corresponded with an attorney in Detroit, who defended me at that particular time and so far he has not sent down the copy of the indictment or the order of release although I believe he has kept my check which I tendered to him.

Mr. White: Did you plead guilty to the indictment or not guilty?

A. I pleaded not guilty. I believe the charge was—

Mr. White: It was read to you, wasn't it?

A. I believe it was a violation of the neutrality act, it was the statute, I believe, of June 2, 1818, violation of the neutrality act.

Mr. Dunleavy: Was that as a result of attempts that you had made, and you describe in one of your letters, of obtaining recruits for the fight against Franco in Spain?

A. Yes.

Q. Were you ever brought to trial?

A. No, we were not brought to trial. Ten days after our arrest, my arrest the indictment was nol prossed. I believe the Attorney General of the United States said that inasmuch as the case had not been brought to trial when it was fresh and inasmuch as the Spanish government had granted amnesty to quite a number of people who had participated, in the country itself, that there was no reason for pressing charges and I was released.

Q. Were you ever arrested again or at any other time?

A. I was arrested on one other occasion."

[fol. 222] Though the applicant used the words "I, myself, had volunteered to go to Spain" in that quotation it cannot be said he had enlisted or entered himself, or hired or retained any other to enlist or enter himself or that he at any time went beyond the jurisdiction of the United

States with intent to be enlisted or enter service of any foreign people as a soldier or other warrior. From that which is contained in the record he could not have been convicted if he had been tried on this charge as plainly appears from the wording of the statute and from the only testimony offered on this subject.

Applicant was again arrested at some town in Texas the name of which town he does not remember, while driving a car for a friend to California. According to the sole testimony on the subject he had all the papers authorizing him to take the car from Detroit to California for a friend. He had taken the southern route through Texas because it was winter time. The police held him, though he had all papers, authorizing him to have the car in possession, for two or three days then released him and returned all his possessions taken from him. No charges were ever preferred against him on that charge. The record does not show which name he used in this arrest. It does show in other testimony that applicant, after he left the Communist party in 1940, used the name which he acquired at birth, at all times; but even if he had made use of the name Joe Fiori which he did when arrested on other occasions, I think it would have made no difference, as there is positively nothing in the record to show anybody was defrauded or that it was intended by applicant by the use of an alias at any time that anybody should be defrauded or wrongfully deceived. The exact date when the Texas arrest occurred doesn't show in the Transcript of the hearing held at Albuquerque but after leaving the Communist Party in 1940 applicant got work and being in Detroit a friend arranged with him to drive his car out to California, so that the incident must have occurred in 1940.

The record does show that during at least eleven years before applying to take the examination, applicant used his own name on all occasions.

The use of an alias when it is not intended to and does not deceive another, or others, to their injury and when it does not defraud another, or others, is not unlawful.

65 C. J. S. "Names" Sec. 9a, states:

" * * * In the absence of statutory prohibition, a person, without abandoning his real name, may adopt or

assume any name, wholly or partly different from his name, by which he may become known, and by which he may transact business, execute contracts, and carry on his affairs, unless he does so in order to defraud others,"

See the multitude of cases cited therein in this regard.

Some years ago, to illustrate, I was asked by a worthy New Mexico citizen who had been long in business in New Mexico and who was a well established and highly respected citizen in his community, to institute the necessary proceeding to change his name. I inquired as to what name he desired to take and he said, "the name by which you [fol. 224] have known me for a good many years". It developed that he was of Polish extraction and the name of his father was so lengthy that when he went to work for another in the business for which his training qualified him he shortened his name and had been known by the assumed name for many years. I explained to him that he might go on permanently using the name he adopted without resort to any court, but his desire to have a judgment of a court in the matter was founded on the thought that he might sometime want to make a trip to the country his parents came from and that he might have difficulty obtaining a passport under the name of his birth since he had been known so long under another name. A judgment of court was obtained according to his desire; but the statute under which the proceeding was instituted was permissive only and did not require my client so to proceed.

To further illustrate, some of the greatest people in history have been better known by an alias than by the name of their birth. Mark Twain is better known than is Samuel L. Clemens; Mr. Dooley is far better known to people of my generation than is F. Peter Dunne; O. Henry is probably better known than is William Sydney Porter; Abraham is far better known than is Abram, the original name of the same man; Paul the Apostle is far better known, I think, than Saul of Tarsus, his former name. Many of the most prominent actors and actresses who have worked in Hollywood since the establishment of the motion picture enterprise in that city have been known by names

other than the names to which they were born. No law at any time ever prevented or does now prevent a change [fol. 225] of name without fraudulent intent, as is shown by the authorities above cited.

The second reason assigned by the Board of Bar Examiners for declining to permit applicant to take the bar examination was his former connection with subversive organizations. As pointed out in the majority opinion, applicant, according to his own declaration, joined the Young Communist League in his senior year at high school. Whether that connection ended upon his graduation at the end of the school year does not appear. He joined the Communist party in 1934 and continued to be a member of that party as it then existed in this country until 1937 when he left the party. After 1937, at some date not stated, applicant joined and remained a member until 1940, when, according to his own declaration, he found the protestations of the leaders of the party as to their interest in man as an individual were false. He decided, so he declared, that the interest of the leaders was in their own welfare and so he left. This is his declaration. There is no other evidence in the record except that supplied, as to membership in the Communist party, by applicant.

The opinion of the majority points out that the Communist party was regarded in a far different manner during the time applicant was a member of it than at the present time. Applicant called the attention of the Board of Bar Examiners to the fact that in the year 1948, and years prior thereto, there was a national Communist ticket. Evidence of membership in the Communist Party at a time fourteen years and more before the application to take the [fol. 226] bar examination and with additional evidence that within that fourteen year period applicant took a solemn oath in the armed service of the United States of America to uphold and defend the Constitution and laws of this country and spent more than three years of such service as entitled him to an honorable discharge from the armed ranks, is not sufficient, in my opinion, to show want of good moral character of the applicant; and this is particularly true when it is shown that during the five years immediately preceding the date of application the appli-

cant was of good moral character, at two educational institutions he attended during that time, and in the communities where he lived, three years having been spent at the law school at the University of this state.

If the evidence in this case leaves any lingering suspicion that applicant may still in his beliefs cling to Communist theories, I think that the least that could be done about the matter of his eligibility to take the bar examination would be to bring him, with his legal representative and members of the Board of Bar Examiners, before the court for such representations as might be made as to the present activities of the applicant as to subversive matters.

The majority makes much of the writing of a letter by applicant to his wife in 1944 after applicant had been in the armed services of this country for approximately a year and while he was on his way to the South Seas to fight and die, if necessary, for his country and for those of [fol. 227] us who were unable to fight for ourselves. In that letter written to his wife applicant spoke with high praise of the Fair Employment Practices Commission and charged that white supremacy is a tool of southern bourbonism to continue in power at the expense of the south itself and the nation as a whole and said:

“Jim-Crow is on a par with Anti-Semitism, anti-Catholicism, anti-Communism. In a democracy one cannot discriminate against a minority.”

Later in the same letter applicant wrote that all the above “anti’s” are:

“* * * most dangerous and stupid mistakes for Americans to make. They violate Christian ethics as well as all other ethical principles that recognize the brotherhood of man. To top it all off, consider them immoral.”

This letter speaks only of mental attitudes and beliefs. It is not difficult for me to understand how a young man, recently married, might display an ambitious desire to appear as a great philosopher to his recently wedded sweetheart from whom he must now be separated for a time.

Though I cannot subscribe to the philosophy expounded by the writer as to some of his declarations, I think he might have been speaking of matters as he understood them to be at the time. Both Republicans and Democrats at that time were naturally opposed to the Communist party, but all recognized that it was the legally qualified exponent of its beliefs to the electorate of the United States.

I do not think this letter was inadvertently offered in evidence by applicant's attorney. It is unfortunate that death has removed the attorney for applicant and he cannot now tell us why the letter was offered in evidence; but [fol. 228] I think it was offered for the same reason applicant so freely told the members of the Board of Bar Examiners of his life's activities from the time he began working at nine years of age until he completed his educative efforts which brought him to the point of readiness to take the bar examination.

I think applicant was denied the privilege of taking the bar examination on the suspicion that he still has beliefs of Communism as it is now known to exist rather than as known to exist at the time applicant was a member of the Communist party. When applicant left the Communist party he used language quite like that used by Mr. Justice Jackson at one place in his opinion in *Communications Association v. Douds*, 339 U. S. 382. The opinion just referred to concurs in part with the majority opinion and dissents in part. The majority opinion points out certain declarations of Mr. Justice Jackson with all of which I fully agree; but in that opinion the writer was speaking as of May 8, 1950, the date of the decision, and not as of 1944.

The opinion of the majority quotes from the opinion of Mr. Justice Jackson in *Communications Association v. Douds*, *supra*, a declaration made by Mr. Justice Jackson as to what the Communist party actually is and the principles for which it stands. The case before the court and on which Mr. Justice Jackson wrote was one brought to test the constitutionality of the National Labor Relations Act as amended in 1947. The act provided that the board would not investigate any question affecting commerce concerning representations of employees raised by a labor organization and that no such petition would be

entertained unless there be on file with the board an affidavit executed in the time stated, by the officers of such an organization that the officer is not a member of the Communist party or affiliated with such party and,

“* * * that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.”

Having considered the Communist party and the propriety of the requirement as to membership in the Communist party, Mr. Justice Jackson wrote:

“I conclude that we cannot deny Congress power to take these measures under the Commerce Clause to require labor union officers to disclose their membership in or affiliation with the Communist Party.”

Turning to the requirement of the oath as to a belief of the officers of the union Mr. Justice Jackson wrote boldly of his belief in fundamental constitutional principles. Among other things:

“Progress generally begins in skepticism about accepted truths. Intellectual freedom means the right to re-examine much that has been long taken for granted. A free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert. The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. Our Constitution relies on our electorate's complete ideological freedom to nourish independent and responsible intelligence and preserve our democracy from that submissiveness, timidity and herd-mindedness of the masses which would foster a tyranny of mediocrity. The priceless heritage of our society is the unrestricted [fol. 230] constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from

falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

The next quotation we take from this opinion of Mr. Justice Jackson upon which the majority placed considerable reliance expresses in very splendid language, very clearly, the idea of which applicant in this case had formed as he stated it and which he said was his reason for leaving the Communist party. The applicant said he came to the realization that the beautiful words declared by the leaders of the Communist party showed a lack of interest in the individual and a desire for power on the part of the leaders and the leadership did not care what happened to the other people. Having so concluded he said that he finally and definitely left the Communist party. Mr. Justice Jackson states:

"The idea that a Constitution should protect individual nonconformity is essentially American and is the last thing in the world that Communists will tolerate. Nothing exceeds the bitterness of their demands for freedom for themselves in this country except the bitterness of their intolerance of freedom for others where they are in power. An exaction of some profession of belief or nonbelief is precisely what the Communists would enact—each individual must adopt the ideas that are common to the ruling group. Their whole philosophy is to minimize man as an individual and to increase the power of man acting in the mass. If any single characteristic distinguishes our democracy from Communism it is our recognition of the individual as a personality rather than as a soulless part in the jigsaw puzzle that is the collectivist state."

It strikes me that applicant in this case at the time he [fol. 231] left the Communist party was thinking along the same straight line, and that his rebirth to the principles of democracy is no more strange than his passing

from disbelief in God to faithful adherence to the religion of his birth.

In the opinion of the majority in *Communications Association v. Douds*, supra, Mr. Chief Justice Vinson wrote:

“ * * * In this legislation, Congress did not restrain the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs. Compare *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943). Section 9 (h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of the public by members of the described groups.”

The few of whom the court there spoke were officials of labor unions and they were the only members of labor unions as to whom an oath as to affiliations or beliefs was required.

The full opinion as written by Mr. Chief Justice Vinson was concurred in by three members of the court. Mr. Justice Frankfurter concurred in all portions of the opinion except that numbered 7 to which he dissented. This is not important to consider in our case.

Mr. Justice Black begins his dissenting opinion in *Communications Association v. Douds*:

“We have said that ‘Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind.’”

Again Mr. Justice Black said:

“Since sec. 9(h) was passed to exclude certain beliefs from one arena of the national economy, it was quite natural to utilize the test oath as a weapon. [fol. 232] History attests the efficacy of that instrument for inflicting penalties and disabilities on obnoxious minorities. It was one of the major devices

used against the Huguenots in France, and against 'heretics' during the Spanish Inquisition. It helped English rulers identify and outlaw Catholics, Quakers, Baptists, and Congregationalists—groups considered dangerous for political as well as religious reasons. And wherever the test oath was in vogue, spies and informers found rewards far more tempting than truth. Painful awareness of the evils of thought espionage made such oaths 'an abomination to the founders of this nation,' In re Summers, 325 U. S. 561, 576, dissenting opinion. Whether religious, political, or both, test oaths are implacable foes of free thought. By approving their imposition, this Court has injected compromise into a field where the First Amendment forbids compromise.

"The Court assures us that today's encroachment on liberty is just a small one, that this particular statutory provision 'touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint.' But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority. Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control. Too often it is fear which inspires such passions, and nothing is more reckless or contagious. In the resulting hysteria, popular indignation tars with the same brush all those who have ever been associated with any member of the group under attack or who hold a view which, though supported by revered Americans as essential to democracy, has been adopted by that group for its own purposes."

The quotations are taken from both Mr. Justice Jackson and Mr. Justice Black because I understand the majority of this court to rely solely on the proposition that at one time in his life, at least fourteen years before applying for admission to the bar, applicant was a member of the Communist party.

[fol. 233] No evidence appears in the record that in the year 1954 applicant was or had been for a period of fourteen years a member of the Communist party.

In the record of the hearing held at Albuquerque this question was asked of applicant with the answer that follows:

"Q. Regardless of whether it is Malenkov or Stalin or the Twelve Apostles in charge of the Communist party, if you took that oath you cannot be a Communist, is that right?

A. I am not a Communist."

The oath referred to in the question is the oath required of any attorney being admitted to the Bar.

We quote from that record again:

"Q. Now, then, that leads me down to this question concerning yourself, you stated that you left the Communist party because of your having reached the conclusion that the aims of those in charge of the policies of the Communist party were personal advancement and what not, rather than a belief in the principles, basic principles of the Communist party. That to me still leaves a doubt in my mind as to whether or not you still believe in the basic principles of the Communist party so that if at some time, let me ask you this question, suppose that the ruler of Russia today were to be overthrown and to the eyes of the Communist, the control of the Communist party was restored to sincere Communists, those that believe in principles of Communism, that condition existed, do you still believe in those principles to the extent that you would again join the Communist party?

A. Never, never!

Q. And then you say that you are not only, while you may have left the party originally because you didn't believe that the leaders were sincere, you now say that you do not believe in the principles of Communism?

A. I am saying, Judge, that for myself I would never join the Communist party. I would never join the Communist party."

[fol. 234] In *Dennis v. U. S.* 341 U. S. 494, the United States Supreme Court in an opinion by Mr. Chief Justice Vinson, discussing the Smith Act, said:

"The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas.' He further charged that it was not unlawful 'to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence.' Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged."

Mr. Justice Frankfurter in the *Dennis* case, *supra*, in a concurring opinion, wrote:

"No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by local citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas.

"We must not overlook the value of that interchange. Freedom of expression is the well-spring of our civilization—the civilization we seek to maintain and further by recognizing the right of Congress to put some limitation upon expression. Such are the paradoxes of life. For social development of trial and

error, the fullest possible opportunity for the free play of the human mind is an indispensable prerequisite. The history of civilization is in considerable measure [fol. 235] the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes."

There is an appendix to the opinion of Mr. Justice Frankfurter pointing to opinions holding that speech cannot be restricted constitutionally unless there would result from it an imminent—close at hand—substantive evil.

The cases cited and quoted from illustrate the view taken by the highest court of the land as to any effort to control the thought processes of any individual. A mere belief in some proposition which is not orthodox when viewed from the standpoint of most people is not sufficient to condemn one as of bad moral character. The quotation taken from the majority opinion in *Communications Association v. Douds*, supra, shows clearly that it is not membership alone in a party which was condemned. The oath required by the statute was of only a few individuals in that party who were in a position of leadership and whose authority and position might enable them to lead the masses of adherents to the beliefs and doctrines of that party to forcible action against the government.

In the recent case entitled "In the Matter of Application of Ben G. Levy for Admission to Practice In the United States District Court, Southern District of Texas" the application was first considered by three District Judges. The matter involved the good moral character of applicant [fol. 236] and nothing else. Applicant was a member of the bar of the State of Texas. The charge upon his character was based on the fact that he had been associated with an attorney practicing in the courts of Texas who was generally reported to be a member of the Communist party. Applicant was denied admission to the

District Court and thereupon took an appeal to the Court of Appeals where the judgment of the lower court was affirmed. Next the matter was taken to the Supreme Court of the United States where the following opinion was rendered:

"Per Curiam: The record in this case discloses no sufficient grounds for the failure and refusal of the District Court to grant petitioner's application for admission to the bar of that Court. The judgment of the Court of Appeals is accordingly reversed with direction to remand the cause to the District Court for appropriate action in accordance with this order." (Advance Reports of the Supreme Court of the United States, Lawyers Edition, Vol. 99, No. 10, page 470, April 25, 1955.)

A very recent case involving moral character of an applicant for admission to the bar of the state of Florida is, Robert C. H. Coleman, Petitioner, v. Olin E. Watts et al, constituting the Board of Bar Examiners of the State of Florida and Guyte P. McCord, as Secretary of the Board, filed May 11, 1955, rehearing denied June 3, 1955, 81 So. 2d 650.

In that case it is shown that applicant is an attorney duly admitted to practice in the courts of Ohio. In October 1953 applicant filed an application for permission to take the bar examination. In further stating the facts the Supreme Court of Florida said:

[fol. 237] " . . . the Board presumably developed certain information concerning petitioner's moral fitness, which was derogatory in nature, and Coleman was requested to appear before the Board on March 12, 1954, for interrogation. At that time, and upon a later occasion, questions were propounded to Coleman by Board members on a wide variety of subjects, including the amounts and sources of his income for past years, and taxes paid thereon; his net worth; his past employments; his business transactions and his associates during his residence in Naples, Florida, since 1946; his personal relationship with his employer's wife at that time, and the purported receipt

of a gift of a house by deed executed by the wife containing restrictions on disposition at her option. Inquiries were also made as to whether or not the petitioner had ever engaged in "kickback" business transactions in connection with his work in real estate development at Naples, and whether or not he had served illegitimately as a "tax front" for certain business associates."

The petitioner was the only witness; all derogatory allusions or derogatory accusations were flatly denied by him. Again we quote from the opinion:

" . . . the Board members did not at any time specify, either generally or specifically, what acts of malfeasance; if any, had been reported to it of which the petitioner might be guilty. Thereafter, the petitioner was informed by the Board that his application to take the examination had been denied because 'he did not meet the requirements for admission to the Florida Bar,' but that he might avail himself of the privilege of a rehearing by producing before the Board, within a sixty-day period, 'new and additional matter which had not previously been considered.' "

After being so advised by the Board the petitioner took the matter to the Supreme Court by certiorari to secure review of the ruling of the Board. Again we quote from the opinion:

"Upon the allegations of the petition, which have been set forth here only in substance, the petitioner charged that the Board, in denying him the right to take the examination without at least informing him of the *general* nature of the complaints and charges and allowing him an opportunity to refute them, 'did not proceed according to the essential requirements of the law, exceeded and acted without jurisdiction or [fol. 238] authority in the premises, illegally and unlawfully took away (from) and denied to . . . petitioner a right granted to other members of the class of which petitioner is a member and denied petitioner the due process of law.' "

The court considered the cases found in the annotations to 28 ALR 1140 and 72 ALR 929 and discussed cases from Oregon, California, Wisconsin, Montana, Georgia, West Virginia, New York, the Court of Appeals for the District of Columbia, Indiana, and North Carolina. We now quote the principles relied on in that case for quashing the ruling of the Board of Bar Examiners and directing that a hearing be afforded applicant in conformity with the principles stated in the opinion.

"It would seem, then, either by virtue of specific holdings, or by necessary implication, in the many cases dealing with the point, that where a court is asked to review the merits of a board's rejection of an application for admission to the bar, annotations 28 A. L. R. 1140, 72 A. L. R. 929, it is incumbent upon the board to sustain its ruling by *record* evidence and not by mere assertions that it is possessed of confidential information which shows the applicant to be unfit; and if the record consists only of evidence supplied by the applicant, then such evidence must demonstrate that the board's dissatisfaction with his application rests on valid grounds and not upon mere suspicion. Although the burden is always upon the applicant to 'satisfy the Board of his or her moral standing,' we have the view that when he has made the *prima facie* showing required by the statutes and rules governing admission to practice, 'it is incumbent upon those making objections to offer evidence to support the same and to overcome the *prima facie* showing made by the applicant. It is not for the applicant to prove the falsity of the charges made against him.' While the burden of proof never shifts, the burden of proceeding does."

I feel confident that the record before us does not show conclusively or even persuasively that the proceedings of the Board of Bar Examiners met the tests, stated in the [fol. 239] quotation, and which are approved by the cases cited in the opinion.

Applicant in our case was denied the privilege of taking the bar examination at the time of his appearance before the Board sitting for that purpose, as he had been advised

previously that he might take the examination at that time. The board had before it certain information undisclosed to applicant which led the Board to hold an interview with him and to make certain inquiries of him of which no record was made except a record of a motion carried unanimously by the Board to the effect that applicant be denied the privilege of taking the bar examination because of subversive activities, aliases and arrests. He was not then advised, as I understand, of any reason for the questions which were asked him and he was not told the substance, even, of anything contained in the "Confidential File". At the hearing held in Albuquerque the applicant by his attorney asked for information as to the contents of the "Confidential File" held by the Board. He was informed that he could not have that and the hearing proceeded so far as anything against the applicant is concerned upon his statements only. There is a statement made by the Bar Examiners which is before the court that the Board did not rely upon the confidential information in reaching its decision but based the decision upon the statements by the applicant. As said above the applicant was denied the privilege of taking the examination when he appeared for that purpose. The result of the hearing at Albuquerque [fol. 240] was the affirmation of its previous action in refusing to permit the applicant to take the examination. In this court applicant has complained of the failure to allow him to know about the reports in the "Confidential File".

There is one other reliance for its action by the Board in its denial to the applicant of the privilege of taking the bar examination and that is the arrests of the applicant.

It is true applicant was arrested several times, but he was never tried or convicted for anything. He has no criminal record and it has been many years since he was last arrested.

If one were on trial for a criminal action mere arrests without convictions could not be shown for any purpose. For impeachment a defendant may be asked if he ever has been convicted of a misdemeanor or a felony. The details of the proceedings leading to a conviction are not admissible as evidence. It seems to be a fact that applicant disclosed the fact of his arrests in explaining the use of an

alias at different times. Since the record does not show any evidence of a fraudulent purpose in the use of an alias, bad moral character can not be established thereby. Just as a consideration of aliases is wrong in the absence of a showing of fraudulent intent, so is the consideration of arrests many years ago when there were no charges filed in some instances and no convictions ever. The good moral character of an individual may be attacked if put in issue by proof of his general reputation in the community for any damaging trait. It is not to be established by specific [fol. 241] instances of what may be, or may be thought to be, wrongful acts. Proof of a general reputation of bad character at a remote time is not admissible.

There is nothing in the record to show want of good moral character since January 1943. There is little if anything in the record other than applicant's beliefs, to show bad moral character at any time. There is only one act of applicant's life which suggests criminal conduct and that was when he was soliciting others to go to Spain with him and to there enter the Loyalist Army of that country. Applicant said he did not know the statute was in existence at the time he was asking others to go with him to Spain to enlist. It is not surprising that he did not know of the statute. There are many of us all over this country to whose attention that statute had not been called until necessity for its consideration arose.

I have referred above to the "Confidential File". It is pointed out in the majority opinion in this case that I am the only member of the court who has read the "Confidential File". In this connection I feel justified in saying that by assignment this case first came to me for writing an opinion. On beginning to study the case I undertook to read and did read every paper in the files, including the "Confidential File". I not only read the instruments once, I have read all of them, including the "Confidential File", several times. The result of my studies at that time led me to prepare a memorandum suggesting that this court call before it the applicant with his attorney [fols. 242-294] and the members of the Board of Bar Examiners for further consideration of the matter. The

other members of this court did not agree with me but concurred in the opinion to which I now dissent.

I think applicant was entitled to know at least the substance of any derogatory information given to the Board of Bar Examiners in the "Confidential File". I think every member of this Court owes it to the applicant, on review here of the action of the Board of Bar Examiners, to know the contents of the "Confidential File".

I do not believe that the applicant has been accorded the rights of freedom guaranteed him by the Federal Constitution or by the State Constitution or that he has had due process, by the proceedings had.

That which I have said in this opinion is in no way a criticism of any member of the Board of Bar Examiners or of that Board. All men make mistakes. I know the members of this Board individually and am sure that no member of the Board would consciously or intentionally do any applicant a wrong. I appreciate also the sacrifices of time and effort which the examiners must make in order to hold the examinations and pass upon the eligibility of applicants for admission. In this case, however, I think an error has been made and that it should be corrected by an order of this court directing the Board of Bar Examiners to permit applicant to take the bar examination.

For the reasons above stated, I dissent.

(S.) H. A. Kiker, Justice.

[fol. 295] SUPREME COURT OF NEW MEXICO

OPINION ON MOTION FOR REHEARING—December 19, 1955
McGhee, J.

Petitioner in his motion for rehearing is chiefly dissatisfied with the type of hearing he was given in this court, asserting the court should have ordered a personal hearing before it and requesting now that such hearing be given. As stated in our opinion, a request for personal

hearing was made by petitioner, but this request was withdrawn as being premature by letter of May 21, 1954. No further request for hearing was made and the case was presented to us, briefed and orally argued, all with reference to the record of hearing before the Board of Bar Examiners held July 16, 1954. The question presented to us was whether applicant had established his good moral character so as to entitle him to take the examination for membership in the bar in this state. Petitioner was given precisely the hearing before this court which he sought.

Petitioner is also dissatisfied because we did not rule [fol. 296] whether former membership in the Communist Party alone establishes a lack or absence of good moral character. The answer to this is the question was not and is not now before us. We stated in our opinion and we reiterate here:

“We believe one who has knowingly given his loyalties to such a program and belief for six to seven years during a period of responsible adulthood is a person of questionable character.”

This conduct of petitioner, together with his other former actions in the use of aliases and record of arrests, and his present attitude toward those matters, were the considerations upon which application was denied.

In connection with the matter of the arrest in Detroit, Michigan, for violation of the Neutrality Act, we take this opportunity to dispel some doubt which may have arisen about the events leading thereto and the appropriateness of criminal prosecution under c. 321, s. 10 (1909), 35 Stat. 1089 (substantially the same as the present s. 959 (a), Title 18, U. S. C. A.)

Said s. 10 provides.

“Whoever, within the territory or jurisdiction of the United States, enlists, or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on

board of any vessel of war, letter of marque, or privateer, shall be fined not more than one thousand dollars and imprisoned not more than three years."

Mr. Justice Kiker in his dissent filed herein has asserted that petitioner's activities were not such that he could have been convicted under the statute. Either Mr. Justice Kiker has construed the statute in a manner at odds with the [fol. 297] authorities (*Gayon v. McCarthy*, 252 U. S. 171, 40 S. Ct. 244, 64 L. Ed. 513 (1920); *United States v. Blair-Murdock Co.* (D. C. Cal., 1915) 228 Fed. 75, (rev'd on other grounds, (C. C. A. 9th, 1917) 241 Fed. 217, cert. den., 244 U. S. 655, 37 S. Ct. 742, 61 L. Ed. 1374 (1917)), which interpret the words "hire or retain" as meaning "engage" in the clause reading, "Whoever * * * hires or retains another person to enlist or enter himself," and the word "himself" in this connection refers to its antecedent "another person."); or he has ignored the following portions of letters from petitioner to his wife, introduced in evidence as exhibits. From the letter of May 9, 1944, we read:

"* * * The question of my enlisting to fight on the side of the Spanish Republicans against, Franco, Hitler & Mussolini. Was in Detroit at the time. In my position as Secretary of the Wayne County Workers Alliance and also as Chairman of the Single Men's Unemployed League (more on this organization later) was very strategically placed for getting recruits to go across.

"And much as I hated it, because I was doing such a good job they kept on putting off and off my own date of departure. Finally put my feet down and insisted I be allowed to go. By this time it was getting toward the end. Finances were low. Arrived in New York with two auto workers. Were given a weeks vacation.

"The boys were now going across without passports and stowing away on ships going to France. 'Twas a beautiful system elaborately worked out and couldn't have been successful if the crews weren't overwhelmingly sympathetic to the cause.

"Remember now as if it had just happened. There were 5 of us. Two from San Francisco, us three from

Detroit. One morning the S. F. boys left and came back the next day. They had gotten caught. Were unfamiliar with ships. That afternoon the announcement, 'We will only be able to send four. One of you will have to go back home.'

[fol. 298] "A simple problem in arithmetic and finances. Cost less to send one person back to Detroit than San Francisco. The choice was left to us as to which one goes back. The 3 of us flipped coins. Two tails and one head fell. I had flipped a head. Given a bus ticket back to Detroit. Cursing my hard luck went back and resumed where I had left off. Thus ends a tale of how not to get to Spain. Incidentally of the last four who left, only one of the Detroit boys lived to come back."

In a letter written May 13, 1944, petitioner described a friendship he had developed with a man named Pete Kowal in Detroit, and stated:

"In mentioning Spain said that soon I would be going across, that someone would be needed to take my place, that despite his lack of experience, thru diligent study he was capable of being that person, that it meant hard work, something he was used to, and besides wherever he went he would run into the same conditions as existed in Detroit.

"He joined the party and decided to stick it out. From that nite we were inseparable. * * *

"* * * The next week the secretary we had wasn't doing so hot, ousted him and Pete elected in his place.

"Pete helped me with recruiting too. As a result he was arrested with me by the FBI on February 6, 1940. Became a member of an exclusive club, the 59ers. All our prison numbers I believe started with 59."

Petitioner is also distressed over the fact the Board of Bar Examiners had access to certain confidential information already noted in our opinion and the fact the content of the file was not made known to him. As stated in our opinion, its author and the justices concurring therein at no time examined the content of this file. The sworn

response of the Board of Bar Examiners to the original petition herein declared its recommendation was not based upon confidential information, but upon facts disclosed by [fol. 299] petitioner himself. Petitioner is now merely seeking to read some prejudice to himself into the proceedings where there is none in fact.

No answer can now be made to petitioner's request he be advised as to whether he will be permitted to take the bar examination at some future date. The answer to such a request will depend upon the showing then made and how it may be viewed by the Court.

Other matters argued upon the motion for rehearing are found to be without merit. The motion for rehearing is hereby denied. It Is So Ordered.

(S.) James B. McGhee, Justice.

We Concur: (S.) J. C. Compton, C. J., (S.) Eugene D. Lujan, J., (S.) Daniel K. Sadler, J.

KIKER, J., dissenting.

The majority opinion, as I read it, permanently disqualifies the applicant from taking the bar examination. The language which I so interpret is quoted in the opinion on the Motion for Rehearing and is as follows:

"We believe one who has knowingly given his loyalties to such a program and belief for six or seven years during a period of responsible adulthood, is a person of questionable character."

[fol. 300] If now, after fifteen years of unobjectionable conduct, three years of which were spent as a soldier in the service of the United States of America overseas, the applicant is a man of questionable character, then for him there can be no hope. If a man who became a member of a junior affiliate of the Communist party at the age of eighteen and later moved into the Communist party, until he was twenty-six years of age, when he permanently separated from that party, is now of questionable character, even though during all of the years just mentioned the Communist party was recognized as much within the law

as was the Republican party or the Democratic party, then it must be true that the individual will never be able to establish a character among his fellows which could justify his association with respectable people or his admission to any of the learned professions.

It is difficult for me to understand how the majority can seriously argue that the use of aliases, without intent to do harm to any individual or group of individuals, could so besmirch a man's character that he will be forever unfit for association with the respectable part of any community. It is, moreover, difficult for me to appreciate how the majority arrives at its conclusion that any number of arrests without a conviction of any offense whatever can forever condemn a man as one of questionable character.

In the discussion in the majority opinion of the arrest of the applicant at Detroit, Michigan, in 1940 for violation of the Neutrality Act, my name is used again, and it is suggested that I have entirely overlooked pertinent authorities or that I have failed to read certain letters written by the applicant in the year 1944 when he had taken the oath required of all soldiers and was enlisted in the service of our country. These letters do no more than expose to applicant's wife, five years after he had severed all connections with the then lawful Communist party, some of his activities in that party. In the majority opinion two cases are cited as instances of authorities which I may have overlooked in expressing my dissent to the original opinion of the majority in this case.

The first of these cases is *Gayon v. McCarthy*, 252 U. S. 171, 40 S. Ct. 244, 64 L. Ed. 513 (1920). In that case the appellant, Gayon, was indicted in the Southern District of Texas for conspiring with one Naranjo of San Antonio, Texas, and of one Mendoza of Laredo, Texas, to hire and retain Foster Averitt, a citizen of the United States, to go to Mexico, there to enlist in the military forces organized in the interest of Felix Diaz then in revolt against the government of Mexico, with which the United States was at peace, in violation of what is called the Neutrality Act.

Gayon was arrested in New York and was held by a commissioner, subject to order of the District Court for his removal to Texas. Next, by petition for writs of habeas

corpus and certiorari the case was removed to the District Court for the Southern District of New York; and there the Court discharged the writ of habeas corpus and entered an order and warrant issued for the removal of the appellant to Texas. The appeal was taken to the Supreme Court of the United States.

The Supreme Court said:

[fol. 302] "If there was before the Commissioner or District Court evidence showing probable cause for believing defendant guilty of having conspired with Naranjo or Mendoza, when he was in the Southern District of Texas, to hire or retain Averitt to go to Mexico to enlist in the insurgent forces operating under General Diaz against the Mexican government, the order of the District Court must be affirmed."

The Court examined the evidence. That before the commissioner was merely the indictment against the defendants and the admission by Gayon that he was the person named therein. The Court held that this established a prima facie case.

Thereupon, the testimony of the accused and of one Del Villar was offered by appellant and that of Averitt by the government. This evidence showed that Del Villar, a political exile from Mexico, had maintained offices in New York, from which he had conducted a systematic propaganda in the interest of Felix Diaz and against the Mexican government; that Gayon was a Mexican citizen and throughout several administrations prior to that of Carranza had served as consul for the Mexican government at several places within and without the United States, one of these being at Roma, Texas. For about two years Gayon had been in the service and pay of Del Villar and General Aurelio Blanquet, the latter being in Mexico with the forces of Diaz. Naranjo was editor and publisher of "Revista Mexicana", a newspaper at San Antonio, Texas, the paper being opposed to the established Mexican government and favorable to Diaz and his interests.

There was much correspondence between Gayon from New York to Naranjo at San Antonio. The correspondence disclosed that Gayon, although in New York, was in close

[fol. 303] association with Naranjo and that the two were engaged actively in promoting opposition to the established Mexican government. In January, 1919 Foster Averitt, an American citizen living in Texas, called at the office of Gayon. Averitt had recently resigned from the United States Naval Academy and was without employment. His purpose in calling on Gayon was to secure, if possible a position in Mexico or Central America as an engineer. Among other things, he expressed his desire to see Generals Diaz and Blanquet personally. He asked for letters of introduction to these men. Gayon refused until he could confer with Del Villar. Averitt called again and discussed with Gayon conditions in Mexico near the border and the means of his going to Mexico and later received from Gayon two letters, one addressed to each of the generals above named. Gayon asked General Blanquet to supply Averitt with necessary information to enable him to make his trip into Mexico. He also asked that Averitt be introduced to General Diaz. In the letter he also requested the general to write as often as possible to enable "us to continue our campaign of propaganda". Having received these letters, Averitt went immediately to San Antonio where he presented the letter to Naranjo who gave him a letter to General Mendoza at Laredo. This letter was presented to Mendoza and through him arrangements were made for Averitt's crossing into Mexico with two or three others, but they were arrested by customs guards and the proceedings followed.

In the interviews had in New York there was suggestion of payment of expenses and a commission for Averitt, [fol. 304] but Gayon said that the furnishing of either would violate the neutrality laws of the United States, but that there would be no difficulty in his getting a commission from General Blanquet on his arrival in Mexico and also said "that he expected that he should be at least a colonel when he saw him again down there". Gayon also said to Averitt that it might be possible to have his expenses made up to him when he arrived in Mexico, and, as a matter of fact, he received \$15 from General Mendoza at Laredo.

As said above, the charge was conspiracy and the overt

acts stated in the indictment were that Gayon delivered to Averitt in New York a letter addressed to Naranjo with instructions with respect to presenting it, and impliedly promised Averitt that upon his arrival in Mexico he would be given a commission in the army of General Blanquet and he also gave Averitt a letter to General Blanquet who was then in Mexico in command of revolutionary forces; that Averitt visited and held conferences with Naranjo who gave him a letter to Mendoza at Laredo in the southern district of Texas; and that Averitt called upon Mendoza and arrangements were made for him to enter Mexico with the intent to join the forces of Diaz under General Blanquet. The court says that it is evident that Gayon entered into the engagement by the promise that he would be given a commission in the forces of Diaz when he arrived there and that he would probably be reimbursed for his expenses.

This case was not concerned with the guilt of Gayon. The [fol. 305] question was whether he should be removed to the southern district of Texas and the Court held that there was a case against him to be tried in the southern district of Texas. Instead of undertaking to quote a few words from the opinion out of the context for the purpose of explaining the meaning of the words "hire" or "retain", I quote from the opinion following:

"The word 'retain' is used in the statute as an alternative to 'hire,' and means something different from the usual employment with payment in money. One may be retained, in the sense of engaged, to render a service as effectively by a verbal as by a written promise, by a prospect for advancement or payment in the future as by the immediate payment of cash."

The second of the cases cited in the majority opinion is Blair et al. v. U. S., 241 Fed. 217, Cert. den., 244 U. S. 655, 37 S. Ct. 742, 61 L. Ed. 1347.

In this case, plaintiffs in error to the Circuit Court of Appeals, 9th Circuit, were charged by indictments in the District Court with conspiracy to violate the Neutrality Act.

The case was presented upon an agreed statement of

facts and the trial court literally instructed the jury to return a verdict of guilty against the defendants. The Circuit Court reversed the judgment of the lower court and remanded the case for a new trial. From the opinion I quote:

"It will be readily seen, not only from the stipulation itself, but from the foregoing declaration contained in the bill of exceptions, that there was no agreement between the parties in regard to any inference or deduction to be drawn from the actual facts agreed on. Obviously, all such inferences and deductions were left to be drawn, and only could be properly drawn, by the jury upon submission of the case to them, after opportunity of argument by the counsel of [fol. 306] the respective parties. It might have been, and doubtless would have been, argued to the jury, as it is argued here to this court, that the agreed statement of facts wholly fails to show that the present plaintiffs in error, or, indeed, any of the defendants to the indictment ever within the territory of the United States, conspired to 'hire or retain,' or ever did 'hire or retain,' any of the persons named in the indictment, or any other person or persons, to go beyond the limits and jurisdiction of the United States with the intent or purpose specified in the indictments. The defendants thereto might well have contended before the jury, as the plaintiffs in error do here, that what they did, as shown by the agreed statement of facts, was in effect to aid and assist the persons referred to in the indictment and in the agreed statement of facts to go beyond the limits of the United States with the intent and for the purpose charged, and was in no respect the hiring and retaining them prohibited by the statute."

There is certainly nothing in either of the cases which causes me to change my opinion as to the possibility of a conviction of the applicant in the case now before this Court if he had been tried following his arrest at Detroit. I think the prosecuting attorneys, including, as the record in this case shows, the Attorney General of the United

States, were aware of the situation and of the evidence which could be adduced. After about ten days following the arrest, applicant was released and, as shown by the record, the case was never thereafter called to trial and, as pointed out in the majority opinion, was dismissed.

After diligent search, I have been unable to find anything which convinces me that the applicant, Mr. Schware, could have *have* been convicted if there had been a trial following his arrest. The record before us does not show that anything was paid by the applicant to anybody else or that the applicant made any promise of anything to any other [fol. 307] person by way of compensation or reward to be paid in the future. Somebody advanced some money to the four men who wanted to go overseas while they were in New York, but that certainly was not Schware. When it was found that the four men could not stow away and reach Spain, and that only three could go, the one who must return home was selected by tossing coins and the applicant was the one who must return home. Somebody gave them the money to pay for his transportation and he returned.

The record shows nothing in the indictment as to its contents. The record names no individual who was hired or retained or engaged, or whom the applicant sought to hire or retain or engage. It is not shown by the record before us that applicant ever succeeded in causing anybody to enlist or enter himself in the United States, in the service of a foreign country.

Evidently, the four who reached New York were acting in concert, one as anxious to get over to Spain as the other.

I have previously read the letters set out in the latest majority opinion and find nothing to change my mind as to this case. Both letters, set out in part in the latest majority opinion, were written in 1944, at a time when the applicant was a soldier in the service of his country. Each of these letters speaks of that which occurred in or prior to the year 1940.

In the majority opinion it is again asserted that neither the author nor any of the justices concurring have at any time examined the file of what is called "Confidential Information." It is also again declared that the Board of Bar Examiners has stated that the recommendation to the

[fol. 308] court was not based on confidential information, but upon facts disclosed by petitioner himself. In the majority opinion this is found with reference to the confidential information: "Petitioner is now merely seeking to read some prejudice to himself into the proceedings where there is none in fact." It must be assumed, I think, that the Board of Bar Examiners, having notified the applicant that he could take the examination on a certain day, undertook for some reason upon his appearance on that date for the purpose of examination, to call him before the Board and interrogate him. Just what the interrogation was about at that time and to what extent it went and just what answers Mr. Schware made does not appear. What was that reason? Could it have been on account of the substance of that which is called "Confidential Information"? The application of Mr. Schware had been in the hands of the Clerk of the Board for a considerable length of time. There must have been some reason for Mr. Schware's interrogation at that time and his being denied the right to then take the examination. As I understand this situation, applicant is now denied the right to take the bar examination because of the hearing in Albuquerque.

That matter has been sufficiently discussed, I think. I am now strengthened in my belief that it is not only the right but the duty of the members of this court to know everything, including the "Confidential Information" placed before the Board of Bar Examiners.

I quote from the majority opinion overruling applicant's motion for rehearing:

"No answer can now be made to petitioner's request [fol. 309] he be advised as to whether he will be permitted to take the bar examination at some future date. The answer to such a request will depend upon the showing then made and how it may be viewed by the Court."

To me this statement is indeed strange. Bearing in mind that since 1940 the applicant has lived a life with which no fault has been found and as far as the record shows, no fault can be found; remembering also that during this fifteen year period applicant has served a period

of three years in the U. S. Army, being there required if need be to lay down his life for those of us who are either too old or too infirm to go into the armed services in defense of our country and that he so served that he received an honorable discharge; and remembering that thereafter he proceeded from his high school accomplishments to acquire such education as qualified him to take the Bar Examination in our state except for a character showing, I inquire if fifteen years of blameless life is not long enough to establish his good character, how long will it take?

Remembering the applicant is now forty-one years of age and desires to enter, at that late time, upon the practice of law, if another fifteen years of life with no wrong doing shall pass, will applicant then be of such character as to enable him to take the bar examination? Assuming the applicant will in the future live a blameless life there can be no record before the Board of Bar Examiners at any future date which will differ in any material respect from that placed before the Board and this court.

It will always be a fact that in his youth and to 1940 applicant was affiliated with the then Communist party at a time when membership in that party cast no stigma on [fol. 310] any individual.

It will always be a fact that applicant, on several occasions, before his father's death made use of an alias.

It will always appear that the applicant, in his youth, was arrested several times but never tried or convicted for any offense.

Under the majority holding, there can be no change of circumstances justifying permission to applicant to take the bar examination at any time in the future if he continues to live a life without misconduct.

The view taken of the present situation by the majority should lead to answering the applicant's question as to whether he will ever be allowed to take the Bar Examination plainly and positively—No. No other logical result can ever follow the order of the majority than the refusal of an examination to the applicant any and every time he may apply. Should Mr. Schwere apply to take the bar examination in any other state or states he would have to disclose this fact.

I deeply regret that the Communist party was ever organized in the United States of America, but I would not condemn and leave helpless those who forsook the error of their ways and have for many years lived the kind of life by other people who are considered worthy citizens.

For the reasons expressed, I dissent.

(S.) H. A. Kiker, Justice.

[fols. 311-312]

SUPREME COURT OF
NEW MEXICO

ORDER DENYING MOTION FOR REHEARING—December 19, 1955

This cause coming on before the Court on motion of Petitioner for rehearing, and the Court having considered said motion and briefs of counsel and being sufficiently advised in the premises announces its decision by Mr. Justice McGhee, Chief Justice Compton, Mr. Justice Lujan and Mrs. Justice Sadler concurring, Mr. Justice Kiker dissenting, denying the motion for rehearing for the reasons given in the opinion of the Court on file;

Now, therefore, it is considered, ordered and adjudged by the Court that the motion for rehearing be and the same is hereby denied.

[fol. 313] (Clerk's certificate to foregoing transcript omitted in printing.)

[fol. 314] SUPREME COURT OF THE UNITED STATES,
October Term, 1955

No. —

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—March 16, 1956

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause, be and the same is hereby, extended to and including May 17th, 1956.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 16th day of March, 1956.

[fol. 315] SUPREME COURT OF THE UNITED STATES,
October Term, 1956

No. 92

RUDOLPH SCHWARE, Petitioner

VS.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW MEXICO

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the Supreme Court of the State of New Mexico is granted, and the case is assigned for argument immediately following No. 5. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2225-1)

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Supreme Court, U. S.

FILED

MAY 17 1956

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~951~~ 72

RUDOLPH SCHWARE,

Petitioner,

v.

**BOARD OF BAR EXAMINERS OF THE STATE
OF NEW MEXICO.**

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1955

No. _____

RUDOLPH SCHWARE,

Petitioner,

v.

BOARD OF BAR EXAMINERS OF THE STATE OF
NEW MEXICO.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW MEXICO**

*To the Chief Justice and the Associate Justices of the
Supreme Court of the United States:*

Your Petitioner, Rudolph Schware, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of New Mexico denying permission to Petitioner to take the bar examination in said state, despite overwhelming evidence of Petitioner's good moral character, on the ground of Petitioner's innocent and legal membership in the Communist Party in the remote past, his innocent and legal use of aliases in the remote past, and a record of arrests, without prosecution or conviction in any case, in the remote past.

Opinions Below

The majority and minority opinions below, both on the original decision and on a motion for rehearing, are reported at 60 N. M. 304, 291 P. 2d 607. They are appended hereto as Appendix A. Appendix B consists of the "opinions" of the administrative agency in this case, the New Mexico Board of Bar Examiners.

Jurisdiction

The order sought to be reviewed was made and entered on September 7, 1955. An order denying a timely motion for rehearing was made and entered on December 19, 1955. (Both orders appear only in the opinions. There were no separate orders.) On March 16, 1956, Mr. Justice Clark of this Court granted an order extending the time for filing petition for writ of certiorari up to and including May 17, 1956. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U. S. C. Sec. 1257(3).

Questions Presented for Review

1. Whether a state may consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution, deny an applicant for admission to the bar permission to take the bar examination, despite overwhelming evidence of the applicant's good moral character, because of (a) the applicant's past use of aliases—though the said use of aliases was legal and in most cases was used in order to avoid racial discrimination and to exercise labor's statutory right to organize; (b) the applicant's membership in the Communist Party in the remote past—though the applicant's membership was innocent of any knowledge of illegal purposes or other illegality on the part of either organization, was held at a time when there

was nothing illegal about such membership, and the applicant since has offered his services in combatting communism to the Federal Bureau of Investigation; and (c) a record of arrests—though in no case was the applicant ever indicted, otherwise prosecuted or convicted.

2. Whether, even if the use of one or two of the standards set forth above in "1" under the said circumstances is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, the use of the other standard or standards which is inconsistent with the aforesaid due process clause does not invalidate the proceedings and require a new hearing.

3. Whether the examination by the Board of Bar Examiners of confidential information, neither said information nor the nature nor a summary thereof being disclosed to the applicant before it arrived at its decision, is inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

Constitutional Provision Involved

Amendment XIV, United States Constitution, Section 1, Clause 2: " . . . nor shall any State deprive any person of . . . property without due process of law. . . ."

Statement of the Case

Rudolph Schware, a veteran of World War II, entered the University of New Mexico Law School in 1950 (30).¹ The second or third week he was in school, he saw the dean of the Law School and disclosed to him his past affiliations with Communist organizations (30, 45). The dean

¹ Such references are to page numbers in the Minutes of the Special Meeting of the Board of Bar Examiners on July 16, 1954.

then raised no question as to whether he would be admitted to the bar, suggested that he be silent on this subject for the time being. Had the later application for permission to take the bar examination inquired as to past Communist affiliations, Schwere would fully have disclosed them (50).

On February 22, 1954, the Board of Bar Examiners met in executive session, denied permission to the Petitioner to take the bar examination (Minutes of Meeting of Board of Bar Examiners, July 16, 1954). The Minutes further show that permission was denied "for the reason that taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico" (3). Since no hearing had been held by the Board before it arrived at this decision, Mr. Schwere's attorney then requested a hearing under date of May 21, 1954, which said hearing was held on July 16 (2).

At the said hearing, Schwere's attorney was advised for the first time of the basis for the Board's action (4). At the July hearing, it was also disclosed for the first time that the Board had received confidential information against Schwere, which it refused to disclose (6-7), though one Board member indicated that he "thought" its action was not motivated by any such confidential information (7). But at no time was either the confidential information or its nature or a summary thereof disclosed to Petitioner.

At the hearing, the Petitioner presented the following affirmative evidence of his good moral character: (1) He had been married in 1944 in both civil and religious ceremonies (9). (2) While in military service [though he was an atheist at that time (32)], he nightly read the Bible to a fellow soldier who could not read very well (13). (3) He ceased being an atheist while in war service and is a member of the local synagogue. His wife is also a member of the synagogue. In 1951, when his first son was born, he

had his son circumcised in the orthodox Jewish ceremony known as the Bris. His six-year-old daughter attends Sunday School at the synagogue (32, 33, 47). (4) In 1950, Petitioner established a small anonymous fund for indigent law school students at the University of New Mexico Law School, which he has continually kept up and intends to keep up (33-4). (5) Petitioner presented letters of recommendation from each professor in the summer session at the University Law School (*Ibid.*) (6) Petitioner presented letters of recommendation from every student in his class whom he could reach with but one exception (*Ibid.*). (7) After leaving the Communist Party, Petitioner volunteered his services to the FBI in combatting communism (26, 44). (8) The Rabbi of Petitioner's synagogue confirmed the other evidence as to Mr. Schware's participation in religious activities, stated that he had a very high opinion of Petitioner, that Petitioner was devoted to the ideals of his religion, possessing a very high moral character. He further testified that the principles of Judaism are completely incompatible with those of Communism (64-5). (9) An attorney at law, who is blind, testified that when he was in law school, Mr. Schware offered his services in reading to him when his wife could not help him in that regard and assisted him in many other ways, though it was at many times most inconvenient to Petitioner (69-70). He further stated his very high opinion as to Petitioner's legal ability and high moral character.

The evidence developed at the hearing as to the three bases relied upon by the Board of Bar Examiners in denying Schware permission to take the bar examination was as follows:

(1) *Re Petitioner's past connection with the Communist Party:* Mr. Schware, born in 1912, joined the Young Communist League in 1932 when he was 20 years old (16), after having been brought up in a slum area and surrounded by a socialist background (13), when he found that the

Socialists in high school had backed down upon being ordered by school authorities to disband a discussion club, though the members of the Young Communist League had refused to disband the organization (16-17). He joined the Communist Party in 1934 (18). He resigned from the Party in 1937, upon his father's death (25). He rejoined the Party and left it again in 1940 when he reached the conclusion that the aims of those in charge of the Communist Party were personal advancement rather than a belief in principles (27, 35, 53). The Stalin and Hitler pact also contributed to his disillusionment (26). He stated that he detests Communism because he is opposed to the doctrine that the state is all-powerful, that the individual does not count, and on the ground that religion is incompatible with Communism (57). His disbelief in Communist principles was gradual and it may have been as late as 1944, while he was in the Army, that he finally repudiated the principles of the Communist Party (59-60). There followed his conversion to religion and his becoming active in his religious faith as set forth above.

(2) *Re The record of arrests:* Petitioner had been arrested on the following occasions: (1) He was one of some 3,000 persons arrested during the course of a strike. Along with some 200 others, he was charged with violation of the California Criminal Syndicalism Act (20). He was released almost immediately. He was never tried or convicted (21). (2) He was arrested once in connection with an alleged violation of the Neutrality Act in obtaining recruits for Spain (27). He had not realized that he was doing anything illegal and the U. S. Attorney General generally stopped prosecutions under the Neutrality Act (22-23). He was never tried or convicted. (3) He was arrested by mistake when driving a friend's automobile. The police denied his right to possession but he convinced them that he had such a right and he was released by the police. He was never tried or convicted (24).

(3) *Re The use of aliases:* The use of aliases was primarily to avoid racial discrimination in employment because of his Jewish name. He therefore used Italian names (18-19). He also used Italian names to help organize a labor union because he felt that his Jewish name would prevent his effectiveness amongst the religiously and racially prejudiced persons whom he was trying to organize (37). He once used an alias in giving his name to the police after the arrest due to labor trouble. In 1937, Petitioner ceased using aliases, believing that he should not be ashamed of the name of his father (25). He states that he does not intend to use an alias, that he never will, that "I have no reason for it and if there was a reason I wouldn't" (41).

The federal questions herein were raised in the petition filed in the Supreme Court of the State of New Mexico to review the denial of the application of petitioner to take the bar examination of the State of New Mexico. The questions were raised more specifically in paragraph 15 (8): "That the denial of the application violates the Fourteenth Amendment of the Constitution of the United States in that it is an attempt by the State of New Mexico, acting through its committee of Bar Examiners, to deprive Petitioner of liberty or property without due process of law * * *." The Court below issued an order to show cause and in its response to the petition the Respondent denied "the truth, the materiality and legal sufficiency of all and every allegation therein contained." The constitutional issues were again raised in the brief submitted on the motion for rehearing.

The Supreme Court of the State of New Mexico did not expressly pass upon the constitutional issues, though of course it could not have affirmed the decision below without resolving the constitutional questions against the petitioner. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930). That the constitutional questions were decided was demonstrated conclusively by the dissenting opinion of Mr. Justice Kiker of the Court below, in which he stated:

"I do not believe that the applicant has been accorded the rights or freedom guaranteed him by the Federal Constitution * * * or that he has had due process, by the proceedings had" (App. A, p. 47a).

POINT I

Denial of admission to the bar because of innocent membership in the Communist Party in the remote past conflicts with the due process clause of the Fourteenth Amendment as previously construed in applicable decisions of this Court.

We are not unmindful of the plenary power of a State to exclude from its Bar persons who are precluded, even by reason of belief, from supporting its Constitution. *In re Summers*, 325 U. S. 561. But this Court recognized in *Summers* that "under our Constitutional system, men could not be excluded from the practice of law * * * simply because they belong to any of our religious groups * * *." And this Court further recognized that even the privilege of government employment could not be constitutionally denied merely on the basis of membership in a Communist organization, including the Communist Party, in the absence of *scienter* of the organization's evil purposes. *Wieman v. Updegraff*, 344 U. S. 183.

There is no question of petitioner's ability or willingness to support the State and Federal Constitutions. The decision below is in direct conflict with *Wieman*. Moreover, not only was innocent ^{1a} legal membership considered below

^{1a} The decision below refers to Schware's "knowing" membership in the Communist Party (App. A, p. 48a, *infra*). Since the record is bereft of any evidence or even a hint that Petitioner knew any of the evil aims of the Communist Party, the Court below could only have meant that Schware merely knew that he was a member of the Communist Party. This is not the *scienter* required by *Wieman* as a condition to constitutionally sanctioned forfeiture of a privilege or right.

as a factor in denying a law license, but innocent *past* membership—in the *remote past*—was considered. Petitioner's formal membership ceased in 1940; it was not until that year that any legislation was enacted indicating that membership in the Communist Party might be unlawful. Petitioner's sympathy with the Communist Party ceased circa 1944²; only one year previously, this Court had held that the Government had failed to prove its case alleging nefarious aims of the Communist Party. *Schneiderman v. United States*, 320 U. S. 118. Under such circumstances, consideration of pre-1940 innocent and legal membership in the Communist Party as a criterion for a law license violates due process, for it is arbitrary and unreasonable.³ *Ex Parte Garland*, 4 Wall. 333; *deJonge v. Oregon*, 299 U. S. 353.

In *Wieman*, this Court noted the possibility of change in a person's views and affiliations, 344 U. S. at 190. Recognition of such possibility was completely absent below. Once a Communist, always disqualified. Should the decision below be left standing, the rights and privileges of one

² Paradoxically and unreasonably, the Court below indicated some doubts as to Schwere's break with Communist principles around 1944, though it did not rest its decision upon that ground. In 1944, the Court complained, Schwere wrote an anti-Jim Crow letter to his wife, calling anti-Communism stupid and dangerous, equating anti-Communism with anti-Semitism and anti-Catholicism (App. A, pp. 18a-19a, *infra*). Surely, no pro-Communist would ever condemn anti-Catholicism, a prime doctrine of Communism. In 1944, moreover, Petitioner was in the United States Army, a fighting ally of Soviet Russia. Anti-Communism might well have been considered close to treason in 1944 by most loyal Americans. An Orwellian rewriting of history cannot constitutionally be the basis for depriving a person of the privilege of practicing law. Certainly distortion of historical and philosophical fact could not serve as a basis for circumventing this Court's review on the basic Constitutional issues involved, even if the Court below had rested its decision upon the 1944 letter.

³ The Court below indeed confessed itself startled by Mr. Justice Jackson's informative opinion about the Communist Party in *American Communications Association v. Douds*, 339 U. S. 382, 422, handed down 10 years after Petitioner broke with the Party (App. A, at 20a).

million American ex-Communists will be fettered. They could be excluded from lawful callings, from licensed professions, no matter how remote or innocent their Party membership. Surely this case presents issues of even greater moment than those in *Black v. Cutter Laboratories*, currently before this Court, which involves only the rights of a relative handful of Communists amongst us.

We do not deny that past non-innocent membership in the Communist Party might have been constitutionally considered insofar as it might be relevant to Schware's present moral character. *Garner v. Los Angeles Board*, 341 U. S. 716. But even his innocent membership was not so considered. Schware's present moral character was demonstrated to be excellent by overwhelming proof. His past innocent membership per se was considered a disqualifying factor. This, we submit, raises an important constitutional issue of both substantive and procedural due process; resolved below in a way not in accord with the applicable decisions cited above. *Wieman v. Updegraff*, supra; *American Communications Associations v. Doud*, 339 U. S. 382, 399; see *Adler v. Board of Education*, 342 U. S. 485, 495-6; Cf. *In re Levy*, 348 U. S. 978.

POINT II

Denial of admission to the Bar because of exercise in the remote past of the ancient common law right to use an alias conflicts with the due process clause of the Fourteenth Amendment as previously construed in applicable decisions of this Court.

The second factor relied upon by the Supreme Court of New Mexico in denying Petitioner the right to take the Bar examination was the fact that he had used aliases nineteen years previously.⁴

⁴ The Court below did indicate that it relied in part upon what it termed Petitioner's "present attitude towards" use of aliases (App. A, *infra* p. 48a). Just what the Court meant is somewhat puzzling.

The right to use a name other than one's given name is an ancient common law right. It was exercised by Petitioner in the states of California and New York. California has long recognized this right and indeed has enacted statutes in affirmation thereof. *In re Ross*, 8 Cal. 2d 608, 67 P. 2d 94; *In re Useldinger*, 35 Cal. App. 2d 723, 96 P. 2d 958. New York, in recognizing this right, has ruled that the use of aliases cannot be a bar to a person becoming a policeman (*Haynes v. Brennan*, 135 N. Y. S. 2d 900 (Sup. Ct., N. Y. 1954)), and has further ruled that an attorney who knowingly permits a witness to testify under an assumed name without wrongful motive is not guilty of professional misconduct. *Matter of Zanger*, 266 N. Y. 165, 194 N. E. 72 (1935). Indeed, New York reports show that even Governor Alfred E. Smith once instructed a City employee to work under an assumed name, and the New York courts refused to discharge the city employee. *Lana v. Brennan*, 124 N. Y. S. 2d 136 (Sup. Ct., New York, 1953). Said the Court:

"The petitioner, under well-settled legal principles, had a right to change his name and assume a name other than that given to him at birth. In the absence of restrictive legislation, a man may lawfully change his name at will without proceedings of any sort. . . .

"In assuming the name of 'Joseph Porgie,' . . . the petitioner joined such illustrious company as Presidents Cleveland, Grant and Wilson, and also Mark Twain, Artemus Ward, John Roland, Napoleon Bonaparte and the Duke of Wellington, to cite but a few of the stalwarts who voluntarily changed names, given or surname or both." 124 N. Y. S. 2d at 137-8.

Surely, for the Court in New Mexico to deny permission to take the Bar examination because of the exercise of a

inasmuch as there is nothing in the record whatsoever to show the petitioner presently condones the use of aliases. On the contrary, he has refrained from using aliases for nineteen years, and has stated in this proceeding, that he would never use them again. Certainly this Court's jurisdiction cannot be defeated by the Court below attempting to dispose of the case on the basis of supposed facts nowhere contained in the record. *Alabama v. Norris*, 294 U. S. 587, 599.

common law right clearly recognized by the states in which it was exercised, attaches an arbitrary and unreasonable requirement to the qualifications for the practice of law. There is no rational relation between the petitioner's legal use of aliases and his character as a potential member of the Bar. The use of aliases nineteen years previously shows nothing about the character of a man today. Moreover, when the aliases were used in order to avoid racial and religious discrimination, and to gain employment and organize unions, it shocks the conscience to find that the person who must resort to the use of aliases to avoid the consequences of action of others, which violates the spirit of the United States Constitution, is to be so penalized.

The absence of a rational relationship between the standard and the qualifications for the profession violates due process of law, *Adler v. Board of Education*, 342 U. S. 485; Mr. Justice Frankfurter's dissent in *Barsky v. Board of Regents*, 347 U. S. 442, 470.

POINT III

Denial of admission to the Bar because of the record of arrests in the remote past, without any prosecution or conviction, conflicts with the due process clause of the Fourteenth Amendment. This presents a substantial Federal question not heretofore determined by this Court.

Your Petitioner had the unfortunate experience of being erroneously arrested three times. The Court below ruled that arrest, even without prosecution or conviction, is a bar to admission to the Bar.

This question has not previously been determined by this Court. This Court has indicated that a State may constitutionally make the absence of a conviction a condition of admission to a learned profession. (See *Barsky v. Board*

of *Regents*, 347 U. S. 442, 451), though it expressed doubts as to whether automatic expulsion from a profession solely because of a conviction is constitutionally valid. *Id.* at 452.

Perhaps the reason that this Court has never been called upon to decide the precise question at issue is because no Court heretofore has ever considered a mere record of arrest as being sufficient derogatory information upon which to predicate the denial of a privilege. It is arbitrary and unreasonable to so predicate such denial. For an arrest is nothing more than an accusation by a police officer. It would seem fundamental to our American way of life to rule that no person can be denied a privilege merely because of such *ex parte* accusation. This would seem to flow, too, from this Court's decision in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, wherein a majority of this Court held that the United States Attorney General could not legally list an organization as subversive and even collaterally thus deprive it of privileges without a hearing. Four members of this Court squarely held that for the Attorney General to do so is a violation of due process. A fortiori, policemen should not be allowed to deprive a person of a privilege merely by arrest, when that person is never prosecuted nor convicted.

Any other rule would leave the way open to clear abuse. Should the decision below be allowed to stand, any person could be barred from the practice of law merely because he had erroneously or maliciously been arrested by a police officer.⁵ To permit an arrest to be considered as derogatory information is to pervert the entire American theory of

⁵ In relation to Petitioner's three arrests, it should be noted that the arrest for alleged unlawful possession of an automobile was subsequently admitted by the police to be an error; that the arrest for violation of the California Criminal Syndicalism Law is meaningless, in the light of this Court's recent decision in *Nelson v. Pennsylvania*, U. S. _____, 100 L. Ed. (Adv.) 415, striking down all states' sedition laws; and that the arrest for violation of the Federal Neutrality Law was clearly in error, as demonstrated by Mr. Justice Kiker in his dissenting opinions (App. A. *infra* pp. 28a, 53a, 59a).

justice, which is that a man is innocent until he is proven guilty, after trial by due process of law. If police officers, by virtue of the decision below, can be the arbiters of a person's privilege to practice law, then we have indeed reached a black day in our jurisprudential history. We believe that this Court should consider this substantial and fundamental Federal constitutional question.

POINT IV

This Court's past decisions indicate clearly that it should grant review to determine whether denial of the right to examine evidence against a person in administrative proceedings violates due process of law.

This point calls for little argument, inasmuch as this Court has twice deemed the very same question raised in this point to be worthy of review. *Bailey v. Richardson*, 341 U. S. 918; *Peters v. Hobby*, 349 U. S. 331.

There are only two differences between those cases and the one at bar. In the case at bar, there is no purported justification as in *Bailey* and *Peters* for secrecy on the basis of the interest in the National Security. No security issue is involved in the *Schwartz* case. Hence, any constitutional violation of petitioner's rights would be even more substantial than any violations that may have occurred in *Bailey* and *Peters*. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 93; *Morgan v. United States*, 304 U. S. 1. Secondly, it may be argued that Petitioner was not prejudiced by the denial of his right, inasmuch as the Supreme Court of New Mexico considered the proceeding before it as a proceeding *de novo*, and the only member of the Court who did examine the secret derogatory information was the dissenting Justice. However, Petitioner would never have had to seek judicial review had he been cleared by the Board of Bar Examiners. Had he been able to examine the derogatory information against

him and to confront and cross-examine his accusers, there might well have been a different result at the administrative level. Hence the Petitioner was prejudiced.

The decision below is in direct conflict with *Coleman v. Watts*, 84 So. 2d 650 (Florida Supreme Court, 1955).

POINT V

The three factors upon which the Court below relied when taken together cannot make constitutional that which is unconstitutional when each is considered separately.

It may be argued that even though one or more of the criteria used by the Court below is repugnant to due process, nonetheless, the Court below did have the right to rely upon the three factors in combination, that by some mysterious process of alchemy, the unconstitutional has been turned into the constitutional by virtue of there being three unconstitutional standards used instead of one. But we believe that the use of three unconstitutional tests cannot make the use of the three tests together constitutional. If this Court believes that one or more of the factors considered did not comport with constitutional standards, then Schwere is clearly entitled to a hearing whose outcome should be determined solely on the basis of constitutional standards.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Opinions of the Supreme Court of New Mexico

(Prevailing Opinion)

McGHEE, J.:

This matter is before us on a pleading we treat as a petition to review the action of the State Board of Bar Examiners in denying the application of Rudolph Schware to take the examination for admission to practice law in this state.

In December, 1953, the petitioner applied for leave to take the bar examination in February, 1954. He was advised by letter that he would be entitled to do so. When he presented himself for examination he was interviewed by the Board of Bar Examiners. No transcript was made of this interview, but at its close the following action was taken by the board:

"No. 1309, RUDOLPH SCHWARE. It is moved by Board Member Frank Andrews that the application of Rudolph Schware to take the bar examination be denied for the reason that, taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed."

A second hearing was held before the board on July 16, 1954, and transcript made thereof. At the conclusion of this hearing the board was of the unanimous opinion the former determination should stand.

It is agreed by all that this court has plenary jurisdiction to review the decision of the board. In re Gibson, 35 N. M. 550, 4 P. 2d 643 (1931); In re Royall, 33 N. M. 386, 268 P. 570 (1928). In such review this court is not limited by appellate rules, but the matter is considered originally.

The substance of petitioner's argument is made under two points, the first of which is: The right to practice law is a property right protected by the Fifth and Fourteenth Amendments of the Constitution of the United States. Under this point reference is made to the cases of *Ex Parte Garland*, 71 U. S. 333, 18 L. Ed. 366 (1866), and *Cummings v. The State of Missouri*, 71 U. S. 277, 18 L. Ed. 356 (1866). In the latter case it is said:

" * * * We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact * * *."

It is not necessary to class membership in the legal profession with ownership of real estate or other tangible article in order to recognize an individual has a right therein. We regard as inutile an attempt to categorize it at all. But, granting that such membership is a species of property, as that word is employed in the Constitution, it does not follow, and we do not take it as contended by petitioner, that the right to its enjoyment is absolute and unfettered by any mode of regulation.

/ In an annotation in 98 L. Ed. 851, at p. 852, substantive due process in its application to the type of property with which we are here concerned is described in the following language:

Appendix A.

"Substantive due process of law may be roughly defined as the constitutional guaranty that no person will be deprived of his life, liberty, or property for arbitrary reasons. Such a deprivation is constitutionally supportable only if the conduct from which the deprivation flows is proscribed by reasonable legislation (that is, legislation the enactment of which is within the scope of legislative authority), reasonably applied (that is, applied for a purpose consonant with the purpose of the legislation itself)."

The board acted under Rule III of the Rules Governing Admission to the Bar of New Mexico, which provides "that the Board of Bar Examiners may decline to permit any such applicant to take the (bar) examination when not satisfied of his good moral character." We do not see how this requirement, which in the same or similar language is universal in this country so far as we know (Anno: 72 A. L. R. 929), can seriously be challenged as unreasonable.

Judge Cardozo has this to say of the requirement of good moral character upon admission to the bar, and afterward:

"Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. * * * (Citing cases.) Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness * * *." In re Rouss, 221 N. Y. 81, 116 N. E. 782 (1917).

The cases are numerous, too, which hold that by asking admission into the legal profession an applicant places his good moral character directly in issue and bears the burden of proof as to that issue. *Spears v. State Bar*, 211 Cal. 183, 294 P. 697, 72 A. L. R. 923 (1930); In re Wells, 174 Cal.

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467, 163 P. 657 (1917); *Rosencranz v. Tidrington*, 193 Ind. 472, 141 N. E. 58, 28 A. L. R. 1136 (1923); *In re Weinstein*, 150 Or. 1, 42 P. 2d 744 (1935).

Thus we are brought up to the controverted, substantial question before us of whether the petitioner has produced proof of his good moral character so as to entitle him to take the examination for membership in the bar of this state, as contended by him under his second point.

An examination of this sort is concerned ultimately with the subjective character of the individual. Character cannot be laid upon a table, so we must resort to two kinds of indirect evidence: First, the pattern of conduct an individual follows, and, second, a consideration of the regard his fellows and associates have for him. This investigatory technique can, at best, but dimly throw into relief the architecture of character; still, it is all we have. In this particular inquiry the technique leads us through petitioner's own disclosures to behavior which cannot be severed from a social ideology which now stands athwart so much of the Eastern World dividing men from men—Communism.

The legal status of the Communist Party in the United States is far different today from that which obtained during the years of the Depression and following, when petitioner was a member of it. He calls our attention to the fact that as late as 1948 the Communist Party was a recognized political party and had candidates for the Presidency of the United States every four years up to and including 1948. We do not overlook the fact that during the years petitioner was a member of the Young Communist League and the Communist Party, from 1932 to 1940, such membership was not unlawful. But that fact does not restrain us from examining his former associations and actions, including his arrests and his use of aliases, and his present attitude toward those matters, as contained in his statements

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to the board, in order to arrive at a conclusion as to his character. As said in *Communications Assn. v. Douds*, 339 U. S. 38, 411, 98 L. Ed. 925, 70 S. Ct. 674 (1950), "the state of a man's mind must be inferred from the things he says or does."

It is generally held that an inquiry into character preceding admission to the bar is different from the inquiry had upon proceedings to disbar. This is already exemplified in part by our earlier reference to the rule that an applicant bears the burden of proof of good character. It is also to be noted in the scope of inquiry. It is said in *In re Wells*, supra:

" * * * In a proceeding to disbar an attorney the burden is on the accuser to prove moral turpitude. The requirement on his admission is to prevent the accrediting of untrustworthy persons as fit to receive the confidence attending upon the relation of attorney and client. The inquiry may extend to his general character as well as to particular acts. It is broader in its scope than that in a disbarment proceeding. The court may receive any evidence which tends to show his character for honesty, integrity, and general morality, and may no doubt refuse admission upon proofs that might not establish his guilt of any of the acts declared to be causes for disbarment."

Similarly, in *In re Farmer*, 191 N. C. 235, 131 S. E. 661 (1926), we find this statement:

"This 'upright character' prescribed by the statute, as a condition precedent to the applicant's right to receive license to practice law in North Carolina, and of which he must, in addition to other requisites, satisfy the court, includes all the elements necessary to make up such a character. It is something more than an absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright

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character ordinarily would, should, or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong. * * *

Before proceeding to examine the record as to the matters assigned by the board for its refusal to endorse the petitioner, "the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests", it should be stated that only one member of this court has looked at the contents of what might be termed the "confidential file"; which contains answers to inquiries which the bar examiners cause to be mailed out regarding applicants who have not theretofore practiced law, the answers being returned to the clerk of this court, who is also the secretary of the Board of Bar Examiners. That member is the Honorable H. A. Kiker. In making this statement the writer and the remainder of the court do not intend that any reflection should be cast upon that justice in his examination of materials not made available to the petitioner. The statement is made for the sole purpose of advising petitioner that, regardless of whether this court has power to examine and rely upon "confidential" information about an applicant for admission to the bar, on which question we make no pronouncement, its members, with the single exception noted, have chosen not to do so. Also, at the oral argument here, and in response and brief, the board disclaims having based its decision upon such information.

As the facts before us are the history of a man, they are best stated in narrative form.

The petitioner was born in New York in 1914. His father was a needles trade worker, an immigrant, a poor man and a socialist. Petitioner began work at the age of nine and continued part-time work during his school years. He attended DeWitt Clinton High School in the Bronx, New

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York, from 1928 to 1932. In 1932, at the age of eighteen, he joined the Young Communist League. This association arose out of the following circumstances, as described by petitioner:

"Well, I was going to High School and a fellow I was playing handball with during school hours when we used to get an hour off told me that he had written a letter to the school newspaper dealing with the question of unemployment in the United States, that the editors of the school paper wanted to publish it but that the faculty adviser refused to allow it to be published and he said that there was a club on the campus which dealt with problems such as that and asked me to attend one of the meetings. Well, I attended one of the meetings of the club and I found out that what he'd told me was true. I thought that freedom of the press was important, I was approximately eighteen years old at the time, and I attended meetings of the club whenever I could, which wasn't too often. The club ran candidates in the school elections. This was just prior to my graduation and they had a—the platform called for lower prices in the school lunch room and stuff like that and our candidates won the election.

"It was after the election that the principal called all the members of the club into his office and our faculty adviser and told us that because of the way that the campaign had been conducted that we would have to disband the club. Now I know that right after we won the election they lowered the price of a glass of milk in the school lunch rooms from five cents to three cents and other foods correspondingly.

"There were a number of people who belonged to the club who belonged to various political organizations, the main ones were the Young Peoples Socialist League, that had about approximately eight or nine members and there were four who belonged to the Young Communist League. To my dying day I will never forget, we were in the principal's office and the principal says, you either—you have to disband the club or else stand

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suspended. And the leader of the Young Peoples Socialist League got up and he said, 'Seeing as how you put it that way, I acquess.' I never knew what that word meant until I looked it up. He meant to say, 'I acquiesce.'

"There were five people who refused to disband. Four of them were members of the Young Communist League, and myself. I thought it was wrong for the club to have to disband and it set me to thinking—I'd been raised in the socialist atmosphere—why was it when a test came, you've got to realize I was eighteen years at the time—when the test came why was it that the socialists had backed down and the Communists had stood up and I thought and thought and finally my—over the objections of my family—an invitation was given to me to join the Young Communist League and I joined the Young Communist League. It was a few years later that I joined the Communist party."

In connection with the refusal to disband the club, petitioner was suspended from school for about three days.

Petitioner joined the Communist Party in 1934 at the age of twenty.

In 1933 petitioner was employed in a pocketbook factory in Gloversville, New York. For the first time he used an alias. In his written application to take the bar examination he stated with regard to the alias:

"I wanted to organize the employees into a union. Because a large number of employees were Italian, I was of the opinion that union organization work would be facilitated if I adopted an alias. I used the alias Rudolph de Caprio while employed at this factory. When the workers were organized into a Local Union affiliated with the American Federation of Labor, I left for my home in New York City and resumed use of my real name."

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At the July, 1954, hearing, the petitioner said of the use of this alias:

"A. Well, I worked in Monticello, New York, in a hotel driving as their chauffeur and then when the work slackened—when the hotel closed down for the summer season, on the way into New York there is a town called Gloversville and had a large Italian population and practically all the people working in the factory there were Italians and in order to get a job to earn a living I changed my name from a Jewish to an Italian name and kept the same first name and was able to get a job.

Q. Was that the first time that you ever used an alias? A. Yes.

Q. Was the sole purpose for that to gain employment? A. Yes."

From February, 1934, to February, 1937, petitioner lived in Los Angeles, San Pedro, San Francisco and Berkeley, California, where he was employed in shipyard work, as a longshoreman and warehouseman, and part of the time as a seaman. During this period he used the alias Rudolph De Caprio.

During the maritime strike in 1934 petitioner was arrested a number of times and was booked under the alias of Joe Fliari, or Fiori.

Of his use of the alias, Rudolph De Caprio in California, petitioner testified at the hearing before the board:

"Q. Why did you use the name in the shipyard? A. The same reason, I don't know of any and I never did find any Jewish person who is working in the shipyard.

Q. Was the use of the name solely to obtain employment? A. Yes.

Q. Was there any intention to deceive anyone? A. No."

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When it was called to petitioner's attention that he had explained the original use of an alias on the basis that he would be more effective as a labor organizer in organizing workers of Italian extraction, and that at the hearing he explained the use of aliases as solely for the purpose of obtaining employment, he testified he used the aliases for both reasons.

On his use of the alias Joe Fliari, or Joe Fliori, upon his arrests, and of the circumstances of the arrests, petitioner testified:

"Q. Did you ever on any other occasion use an alias?

A. Yes, a number of times, I believe it was two. I have tried to check with the Los Angeles Police Department and made a trip to California purposely to get the information, because the information was refused to be supplied to me by mail, to find out how many times I'd been arrested in San Pedro, California. I know definitely that I was arrested twice and this was in the course of a strike and while I was in San Pedro I went through the files of the San Pedro Newspaper and found that there were approximately two to 3,000 people arrested in the course of about 66 days, approximately, over 200 on a charge of suspicion of criminal syndicalism.

(Discussion off the record.)

*Q. You were speaking about the arrest of approximately two or 3,000 people during the strikes at San Pedro, California, were you arrested at that time?

A. Yes, I—to the best—

Q. First let's stay with the name, what name were you working under in the shipyard? A. Rudy Di-Caprio.

Q. And how many times were you arrested during the course of that strike? A. To the best of my knowledge and belief twice.

Q. At that time it was— A. Criminal syndicalism.

Q. Is that a state or federal? A. State.

Q. What is criminal syndicalism, if you know? A. Well, there is a statute which defines criminal syndi-

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realism as a person—as the commission of an act in which somebody attempts to overthrow or subvert the state government, essentially that is what it is.

Q. Were you ever tried on this charge? A. No, I was never tried on the charge.

Q. Were the charges dismissed? A. I assume so, I was never brought before a judge, I was kept in jail, I remember one time 72 hours and then released and the second time I remember I was in jail approximately five days and read in the paper on the 3rd day that I'd been released but that I was still in jail but I'd never been brought before a judge and was released.

Q. And now sticking with the use of names, you have testified that you used the name of DiCaprio at Gloversville, New York, and at San Pedro, did you use any other alias at any time up until 1940? A. Well, as I said, when I was arrested I used the alias of Joe Fiori.

Q. Was that in connection with employment or just a name that you assumed to give to the police? A. A name that I assumed to give to the police, I suppose, it is a long time ago, I suppose I thought, well, if the company knew that I'd been arrested it was possible that I wouldn't be able to go back to work.

Q. There was no question of your identity with the police since they had you in person? A. No, no.

Q. They had you regardless of what your name was? A. That is correct.

Q. And did you obtain any monetary benefit as a result of that name? A. None whatsoever."

In the Communist Party petitioner used either the name Rudy DeCaprio or Joe Fiori. He could not recall which one.

In February, 1937, petitioner's father died and he returned to New York. At this time he left the Communist Party. He described this break with the Party as follows:

"Q. You say you left the Communist party in 1940. Would you tell the Committee in your own words the

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reason why you left. A. Well, I'd left the Communist party once before in 1937, I believe, when my father died. I left California and went back home to New York. I dropped out of the Communist party then and that was the time when I assumed my rightful name and said to myself, why are you ashamed to be known as Rudolph Schware, the son of your father * * *."

In the years between May of 1937 and January of 1943, petitioner worked for a short time in Chicago, then in Texas at a vegetable processing plant, then in Indianapolis picking corn. He was intermittently hitch-hiking and looking for work, and finally came to Detroit. He testified as to the time spent in Detroit as follows:

"* * * I was single at the time and the relief that the City of Detroit gave for single men was this place called Fisher Lodge, approximately 2,000, 3,000 people, and food was about as much as the city could afford at that time and I was instrumental in helping to organize an organization in this lodge so that we could get better food and perhaps able to get jobs as a result of that."

In Detroit he was again approached to rejoin the Communist Party, which he did. He states of this reaffiliation:

"* * * my disillusionment had been going on and then you had in 1939, I believe it was, you had your Stalin-Hitler pact which began to raise a lot of questions in my mind and then in 1940 I began to see. At that time I was the State Secretary of the Michigan Workers Alliance and I began to see that the Communist party wasn't interested so much, those beautiful words wasn't so much that but a struggle for power on the part of a few individuals that they wanted the power and they didn't care what happened to the other people. Of course, I was a lot older then, I was a lot older then, too, and I'd been questioning and questioning for quite some time and finally I made the events reach the stage where the party organization was trying to say

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how the organization of which I was the elected secretary should be run, not for the benefit of the organization, that is when I reached the final decision, you and I part ways and I left."

Petitioner was arrested in Detroit in 1940 in connection with the Neutrality Act of 1816, when he was engaged in obtaining recruits to oppose Franco's forces in the Spanish Civil War. He had himself volunteered to go to Spain to fight, but was unsuccessful in getting passage there. He states of this arrest:

"Q. * * * I want to inquire whether or not you knew at that time that you were engaged in these recruiting activities that there was any question as to their legality? A. No, I had no knowledge whatever that I was violating a law. There was no knowledge whatsoever.

Q. Was the recruiting being conducted openly or surreptitiously? A. Quite openly. Everybody knew that I, myself, and the people in my organization and in the surroundings that I was traveling in at that time, everybody knew, for instance, that I, myself, had volunteered to go to Spain but I had no knowledge whatsoever that I was breaking any law. Of course, I had read history and known of during the American Revolution people coming over from Europe to help our fight here, before we became a nation."

The charges under which he was arrested in Detroit were terminated by nolle prosequi filed on behalf of the government.

From 1940 to 1943 the petitioner had scattered employment, working part of the time as a truck driver. He was arrested in 1940 or 1941 in a town in Texas, the name of which he could not recall, on a charge of "suspicion of transporting a stolen vehicle." He stated he was driving the car to California for a friend and after being held while the police presumably inquired into the ownership of the car and his right to possession of it, he was released.

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In response to question in petitioner's written application to take the bar examination asking that he state every residence he had had since he was sixteen years of age, and indicating the name of the city and state, the street address and the period time by month and year of each separate residence were to be given, petitioner stated that he had had ten different residences during the period March, 1934 to January, 1943, the latter date being the time he was inducted into the United States Army. He lived in California, New York, Illinois, Texas, Michigan and Indiana. He could recall only two street addresses. One was the home of his family in New York where he spent three months in 1937; the other was an address in South Bend, Indiana, where he lived approximately two years.

Another question on petitioner's application form sought information as to all employments he had had since the age of sixteen years, specifically asking for the time periods of such employment, exact addresses of offices or places where employed and the names and present addresses of all former employers. From March, 1934, to November, 1935, petitioner was employed as a machinist's helper at Bethlehem Shipbuilding Company, Terminal Island, San Pedro, California. He could not recall the names of his superiors. He left there to join the merchant marine. He then spent five months as a seaman, first on a freighter. He could not recall the name of the ship, but believed he worked for the Calmar Line, making no statement as to the whereabouts of its offices. Then he left that employment to sail on a steam schooner plying the Pacific Coast. He made no statement as to the name of his employer, or otherwise identified the schooner. After that he worked ten months as a longshoreman on the docks in San Francisco, Oakland and Berkeley, California. Then, after a trip to New York at the time of his father's death he worked in a grocery store for some four months. He could not recall the name of the

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store or the owner. He worked two months in a vegetable processing plant in Rio Hondo, Texas. He could not recall the name of the plant or the owner.

The application states that from March, 1938 to June, 1940, he was in Detroit working with the Wayne County Workers Alliance and the Michigan Workers Alliance. The offices were located on Grand River Avenue. He gives no names of associates. Upon leaving this work he was unemployed for a while, then became regularly employed as a truck driver in South Bend, Indiana for about two and a half years. One company for which he worked went out of business when the 1942 car production was halted. He gives the name of the company, the owner and the office address of his last employer in South Bend, which corresponds with the period of time for which he had given a residence address as earlier noted. This brought him up to the time when he was inducted into the army.

The summation of all this is that for approximately nine years petitioner has provided only one residence address other than the home of his parents in New York. Over that period he has given only one personal name of an employer, for whom he also gave a completed street address in South Bend, Indiana, and only the street name for the location of the two Workers Alliances he was connected with in Detroit. This adds up to only slightly more than a complete blank. If it were not for the fact that petitioner had such a tenuous existence during those years, his inability to recall with more definiteness the location of his residences and the names and locations of his employers would be entirely void of explanation.

Petitioner was drafted into the Army in January, 1944, and served until 1946, when he was honorably discharged. He lived in South Bend, Indiana from 1946 to 1950, during which time he was self-employed in the sale of venetian blinds and also attended Western Michigan College.

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In 1950 he enrolled in the Law School of the University of New Mexico. He discussed with the dean of that school his former affiliation with the Communist Party. When questioned by one of the bar examiners at the hearing as to whether it had ever occurred to him that his experience and membership in the Communist Party and his activities in that organization would affect him in his ability to be admitted to the bar, he stated:

"A. Well, I'd classify that under the heading of a calculated risk. In other words, we knew that there was a possibility that I would not be permitted to take the exam. On the other hand, we also knew that these are things that took place when I was a young person * * * I was expecting that you gentlemen will say that we have to hold a hearing on your case, Mr. Schwere. Frankly, that is what I expected."

Petitioner married in 1944. He has two children. Nine letters which he wrote to his wife while in the armed services in 1944 were offered by him in evidence as corroborative of his claim to be converted from Communism and to be of good moral character. The Rabbi of a synagogue in Albuquerque testified the petitioner was a member of his congregation in good standing, that his children received religious training.

While in law school petitioner established an anonymous scholarship of \$50.00 a year to be given to needy law students, which he has continued and hopes to continue indefinitely.

Some seventeen letters from law professors and students and business associates were introduced into the record stating that petitioner is a person of good moral character, these letters being from persons who have known the petitioner in New Mexico.

Burdensome though it be to the reader, there is still more of the record of petitioner's hearing before the board which

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must be covered. He testified, on questions by the board members, regarding his knowledge of Communist aims and methods. This testimony is somewhat extensive and we quote only part of it:

“Q. . . . Is it true or is it not true that a bona fide member of the Communist party recognizes only the Communistic authority as the authority to which he owes all allegiance, is that correct? A. That is correct.

Q. As a Communist, in other words, a Communist who may be an American citizen, but if he joins the Communist party, his loyalty and allegiance are to the heads of the Communist party in Russia, is that correct? A. Well, I know when I was a member of the Communist party while we looked to Russia as the guiding star, still we considered ourselves American citizens and as a legal political party. Does that answer your question?

Q. Not entirely. Let's say that I belonged to the Communist party and a directive of whatever nature it may be comes from Russia or at least where I understand is the source of words of wisdom and a certain directive comes out to a true member of the Communist party— A. That is all.

Q. —am I under obligation, if I am a Communist, to obey that directive? A. That is law and that is probably one of the reasons why the Communist party has been so much repudiated by the American people. We've got, just like myself, there have been hundreds of thousands of people who entered the Communist party's ranks and finally end up asking ourselves questions and starting to question why, why, and then saying to heck with you.

Q. Well, to get back to this thought that the basic concept of the Communist party is that they—it recognizes no nationalistic lines, that is, if you belong to the Communist party in the United States you are the same breed of cats as one who belonged to the Communist party in Argentina or whatever that may be? A. That is correct.

Q. And the belief is that the Communist party as such should be the controlling factor in government, is that right? A. That is the aim eventually.

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Q. All right now, let's say that I am a member of the Communist Party and I am residing in the United States and you are a member of the Communist party and you are residing in Mexico. Say that a war should break out in which Russia, China, whatever countries might make the alignment, would be on the one side and the United States and other countries, including Mexico, would be opposed, and the directive would come out of Russia to me here and one to you down there to do whatever we could to aid the cause of Communist forces that were at war with, what they would classify if Russia— A. I have no doubt they would.

Q. —would issue that directive, if I am a true Communist and that directive would be to blow up the railroad track or something I would be advised to do it, it would be my duty? A. I said I have no doubt.

Q. All right, if I am a Communist I follow that directive, is that correct? A. Yes."

Throughout the record of this hearing petitioner asserts that he left the Communist Party because he was disillusioned with its leaders and further that he came to realization that it was the individual that counted, rather than the all-powerful state advocated by Communism.

There is to us a lack of credibility in petitioner's testimony as to the extent of his disillusionment with the leaders and the philosophy of Communism, for we find in one of the letters to his wife written in 1944, four years after his break with the Party, which his attorney offered in evidence along with others to show what was in petitioner's heart during the year they were written, these assertions:

" . . . The FEPC (Fair Employment Practices Commission) is one of the most important of Roosevelt's win the war agencies. It has helped to break down the reactionary barrier, that relegated Negroes to the unskilled, most dirty jobs at the lowest wages, in order to allow them to contribute their labor to increasing production for victory. Thousands of them now perform skilled labor in many industries that they never had

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a chance of entering before Roosevelt established the FEPC.

"White supremacy is a tool of the Southern bourgeois to continue in power at the expense of the welfare of the South itself and the nation as a whole. It is on a par with Hitler's attempt to delude the German people into believing that they are Aryan supermen.

"You yourself know intimately of the evil: Anti-Semitism. You know that the Jewish people throughout the ages have made important contributions to the cause of progress. Jim-Crow is on a par with Anti-Semitism, anti-Catholicism, *anti-Communism*. In a democracy one cannot discriminate against a minority. When one does, consciously or unconsciously they are playing Hitler's game, making use of his favorite tactic to divide us, certainly not contributing to National Unity which is so important not only for winning the war in the shortest period of time, but also for the winning of a just peace and making this world a better place to live in for all.

"All the above anti's I mentioned are most dangerous and stupid mistakes for Americans to make. They violate Christian ethics as well as all other ethical principles that recognize the brotherhood of man. To top it all off, consider them immoral." (Emphasis supplied.)

We cannot believe that the foregoing letter is the letter of a man who four years previously had battled within himself and repudiated Communism as a quest for power by a few, as he declares to have done. No doubt the introduction of this letter by petitioner was inadvertent, but it tells us what was in his heart. He would still be the voice of all who would criticize Communism.

There was certainly nothing inadvertent about petitioner's membership in the Communist Party from 1934 to 1940, when he was twenty to twenty-seven years of age.

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We agree with the Board of Bar Examiners that these are responsible years. During them his activities were largely connected with the labor movement in this country, as an organizer working out of the Communist Party. We have no reason on the record before us to credit him with a lack of knowledge of the purposes, aims and machinery of that Party in the United States.

The foundation of the Communist "theology" is laid bare in Justice Jackson's concurring opinion in *Communications Assn. v. Douds*, cited *supra*, beginning at page 422 of the U. S. report, in the following numbered statements. We omit the exposition which in the opinion follows these statements, in the interest of brevity, but commend a full reading of the entire opinion for a clear and startling picture.

"1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. . . ."

"2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. . . ."

"3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. . . ."

"4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement. . . ."

"5. Every member of the Communist Party is an agent to execute the Communist program. . . ."
(Italics omitted.)

We believe one who has knowingly given his loyalties to such a program and belief for six to seven years during a period of responsible adulthood is a person of question-

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able character. We do not think it an exaggeration to say that many have doubtless been denied entry into or expelled from membership in the legal profession for far less serious offenses against ethic.

We think, also, that the conclusion is warranted that petitioner has erased in his own conscience any culpability attaching to the use of aliases upon the basis he thought it necessary to hide his ancestry to secure employment. He does not today appear to us to bear the weight of this deception upon his employers and the police as a dishonesty, but simply as an excusable expedient. Furthermore, he excuses his arrests in California upon the ground that many others were arrested, too. With respect to the arrest in Detroit, for activity in violation of a federal statute, we take it that he regards his work in obtaining recruits for a foreign war as even commendable because he had concluded which side was right.

On the basis of these considerations we must approve the recommendation of the Board of Bar Examiners. This board is comprised of leaders of the legal profession in this state. One of its members is a former district judge, and another is at this time a member of the Board of Governors of the American Bar Association. They are responsible, experienced attorneys. They questioned the petitioner, heard him and observed his demeanor. At a time before the formal hearing before the board, the petitioner wrote a letter to the board asking that he be permitted to appear before this court, but, on May 21, 1954, this request was withdrawn as being premature and was never renewed.

We take no pleasure in the duty we have had to perform, for no man is all good or all bad. The record on which this decision is based came from the petitioner himself, who presently enjoys good repute among his teachers, his

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fellow students and associates and in his synagogue. But our obligation to the bar of this state knows no compromise. Petitioner has sought an office difficult to obtain and difficult to serve. The oath required of attorneys in New Mexico, based upon § 18-1-9, 1953 Comp., reads as follows:

"I will support the Constitution of the United States and the Constitution of the State of New Mexico;

"I will maintain the respect due to Courts of Justice and judicial officers;

"I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as (are) consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

"I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged;

"I will never reject from any consideration personal to myself the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice."

To hold otherwise than we do, we would have to state that the petitioner has proved to us that he is a man of good moral character for the purpose of being given the office of attorney. We do not hold this conviction. Accordingly,

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it must be ruled that petitioner's application to take the bar examination of the State of New Mexico is denied.

IT IS SO ORDERED.

s/ JAMES B. MCGHEE,
Justice.

WE CONCUR:

s/ J. C. COMPTON, *C.J.*

s/ EUGENE D. LUJAN, *J.*

s/ DANIEL K. SADLER, *J.*

(KIKER, *J.*, to file dissenting opinion at later date.)

(Dissenting Opinion)

KIKER, *J.*, dissenting.

The applicant after being notified, according to the record, that he might take the examination and after having appeared on the date the examination was to begin was interviewed by the members of the Board of Bar Examiners and then told he would not be allowed to take the examination.

The reasons given by the Board for declining to allow the applicant to take the examination were contained in a motion which was unanimously carried:

“ * * * for the reason that, taking into consideration the use of aliases by the applicant; his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico.”

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After applicant had been denied the privilege of taking the examination, he wrote a letter to the Board in which he said:

" . . . If after you have reconsidered the question and your answer is still the same, I would appreciate being given an opportunity to appear personally before the Supreme Court when you certify the question to them."

Later, in the month of July, 1954, the applicant was given a hearing before the Board. At this hearing the applicant testified at length, this was at Albuquerque. In addition to the applicant the following witnesses testified briefly in his behalf: Mrs. Schware, applicant's wife; Rabbi Moshay P. Mann of Albuquerque, who is the Rabbi of the Congregation B'Nai Israel; Julia R. McCulloch, secretary to the dean of the law school at the University of New Mexico; and Monroe Fox, an attorney practicing at Chama. There were also seventeen letters which applicant got from students at the law school from professors present at the University when applicant was getting together testimony as to his character.

At that hearing no witnesses appeared to show want of good character on the part of applicant. The result of the hearing was that the Board of Bar Examiners affirmed the position taken by it at the time applicant applied for the examination in February 26, 1954 and so the application stood denied by the Board of Bar Examiners until the opinion of the majority was filed.

The majority, in the opinion, discusses the three reasons assigned by the Board of Examiners for refusing to allow applicant to take the examination February 26, 1954, the first of these is the use of aliases beginning more than twenty years before the date of the examination and continuing from time to time over a period of approximately eight years.

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When applicant was eighteen years of age, after graduating from high school, he worked for a time in a hotel at Monticello, New York. Leaving Monticello on his way into New York City, he came to a town called Gloversville where a large part of the population was Italian and where the workers at the factory were practically all Italian. He applied for a job and adopted the name of Rudolph Di Caprio and used that name while working there. He gave two reasons for the use of this name at different times and the majority seems to think the reasons are wholly inconsistent and show a tendency to falsehood. He explained in his application that since practically all the workers were Italian he thought in order to organize a union he would be more effective using the Italian name. He was dark and could easily pass for Italian. He stated at the hearing that he used this alias at the factory for the purpose of getting a job and did get a job working with Italians at that factory.

I do not see any great inconsistency between the two statements. Being a Jew, he must have felt as he said he did, that he probably could not get a job there and he would be unable to organize a union if he did. When the workers were organized into a local union, they affiliated with the A. F. of L. after which applicant left for his home in New York City and resumed use of his own name. There is no evidence to show that the A. F. of L. failed to investigate the union before taking it into its organization as an affiliate and I have never heard of the A. F. of L. being charged with being Communist or having engaged in any subversive activities.

The statement made by applicant, as shown in the majority opinion, discloses the fact that he worked in Los Angeles, San Pedro, San Francisco and Berkeley, California from 1934 to 1937 and during that time he worked under the name of Rudolph Di Caprio. He explained this fact

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stating that at none of the places where he worked in shipyards, as longshoreman and warehouseman were any Jews employed. The employees were almost entirely Italian and so applicant used the name Di Caprio.

There is no hint or suggestion in the record made at the hearing given applicant in Albuquerque that he at any time used the name for the purpose of defrauding any person.

Applicant also used another Italian alias on the occasions of several arrests about which he told the Board of Bar Examiners. The name used was Joe Fliari or Joe Flori. He told the Board that he made a special trip to California for the purpose of ascertaining the number of times he was arrested at San Pedro. He stated that he was arrested twice in the course of a strike and that approximately three thousand people were arrested during the period of sixty-six days of the strike and that of these, two hundred men, of whom he was one, were arrested on a charge of suspicion of criminal syndicalism. He had been working under the name of Rudolph Di Caprio before being arrested, but when arrested he gave the police the name of Joe Fliari. He stated that it had been a long time since the arrest occurred and that he supposed that the reasons for using that alias was fear that the company for which he had been working might not allow him to return to work. Nobody was or could have been defrauded by the use of that name. It is not shown that applicant intended to defraud anybody by its use.

In 1940 applicant was arrested in Detroit on a charge of violation of the Neutrality Act which became Federal Law in 1818 and which was revised in 1909 and now appears as Sec. 959, Title 18 U. S. C. 1952 Ed.; since 1909 the law has not changed and was in effect in 1940 and is as follows:

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“(a) Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than \$1,000 or imprisoned not more than three years, or both.”

The majority opinion quotes briefly a portion of the testimony given by applicant at the close of his examination with reference to the Detroit arrest. I quote that which precedes that quoted by the majority.

“Q. You have spoken about arrests, you testified to the arrest for criminal syndicalism twice in San Pedro, California, were you ever arrested on any other occasion? A. Yes, I was arrested in 1940.

Q. Where? A. In Detroit, Michigan.

Q. And what was the charge? A. Well, I have attempted to obtain a copy of the indictment and the order of release and I corresponded with an attorney in Detroit, who defended me at that particular time and so far he has not sent down the copy of the indictment or the order of release although I believe he has kept my check which I tendered to him.

Mr. White: Did you plead guilty to the indictment or not guilty?

A. I pleaded not guilty. I believe the charge was—

Mr. White: It was read to you, wasn't it?

A. I believe it was a violation of the neutrality act, it was the statute, I believe, of June 2, 1818, violation of the neutrality act.

Mr. Dunleavy: Was that as a result of attempts that you had made, and you describe in one of your letters, of obtaining recruits for the fight against Franco in Spain?

A. Yes

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Q. Were you ever brought to trial? A. No, we were not brought to trial. Ten days after our arrest, my arrest the indictment was not pressed. I believe the Attorney General of the United States said that inasmuch as the case had not been brought to trial when it was fresh and inasmuch as the Spanish government had granted amnesty to quite a number of people who had participated, in the country itself, that there was no reason for pressing charges and I was released.

Q. Were you ever arrested again or at any other time? A. I was arrested on one other occasion."

Though the applicant used the words "I, myself, had volunteered to go to Spain" in that quotation it cannot be said he had enlisted or entered himself, or hired or retained any other to enlist or enter himself or that he at any time went beyond the jurisdiction of the United States with intent to be enlisted or enter service of any foreign people as a soldier or other warrior. From that which is contained in the record he could not have been convicted if he had been tried on this charge as plainly appears from the wording of the statute and from the only testimony offered on this subject.

Applicant was again arrested at some town in Texas the name of which town he does not remember, while driving a car for a friend to California. According to the sole testimony on the subject he had all the papers authorizing him to take the car from Detroit to California for a friend. He had taken the southern route through Texas because it was winter time. The police held him, though he had all papers, authorizing him to have the car in possession, for two or three days then released him and returned all his possessions taken from him. No charges were ever preferred against him on that charge. The record does not show which name he used in this arrest. It does show in other testimony that applicant, after he left the Communist party in 1940, used the name which he

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acquired at birth; at all times; but even if he had made use of the name Joe Fliori, which he did when arrested on other occasions, I think it would have made no difference, as there is positively nothing in the record to show anybody was defrauded or that it was intended by applicant by the use of an alias at any time that anybody should be defrauded or wrongfully deceived. The exact date when the Texas arrest occurred doesn't show in the Transcript of the hearing held at Albuquerque but after leaving the Communist party in 1940, applicant got work and being in Detroit, a friend arranged with him to drive his car out to California, so that the incident must have occurred in 1940.

The record does show that during at least eleven years before applying to take the examination, applicant used his own name on all occasions.

The use of an alias when it is not intended to and does not deceive another, or others, to their injury and when it does not defraud another, or others, is not unlawful.

65 C. J. S. "Names" Sec. 9a, states:

" * * * In the absence of statutory prohibition, a person, without abandoning his real name, may adopt or assume any name, wholly or partly different from his name, by which he may become known, and by which he may transact business, execute contracts, and carry on his affairs, unless he does so in order to defraud others, * * *"

See the multitude of cases cited therein in this regard.

Some years ago, to illustrate, I was asked by a worthy New Mexico citizen, who had been long in business in New Mexico and who was a well established and highly respected citizen in his community, to institute the necessary proceeding to change his name. I inquired as to what name

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he desired to take and he said, "the name by which you have known me for a good many years." It developed that he was of Polish extraction and the name of his father was so lengthy that when he went to work for another in the business for which his training qualified him, he shortened his name and had been known by the assumed name for many years. I explained to him that he might go on permanently using the name he adopted without resort to any court, but his desire to have a judgment of a court in the matter was founded on the thought that he might sometime want to make a trip to the country his parents came from and that he might have difficulty obtaining a passport under the name of his birth since he had been known so long under another name. A judgment of court was obtained according to his desire; but the statute under which the proceeding was instituted was permissive only and did not require my client so to proceed.

To further illustrate, some of the greatest people in history have been better known by an alias than by the name of their birth. Mark Twain is better known than is Samuel L. Clemens; Mr. Dooley is far better known to people of my generation than is F. Peter Dunne; O. Henry is probably better known than is William Sydney Porter; Abraham is far better known than is Abram, the original name of the same man; Paul the Apostle is far better known, I think, than Saul of Tarsus, his former name. Many of the most prominent actors and actresses who have worked in Hollywood since the establishment of the motion picture enterprise in that city have been known by names other than the names to which they were born. No law at any time ever prevented or does now prevent a change of name without fraudulent intent, as is shown by the authorities above cited.

The second reason assigned by the Board of Bar Examiners for declining to permit applicant to take the bar examination was his former connection with subversive or-

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ganizations. As pointed out in the majority opinion, applicant, according to his own declaration, joined the Young Communist League in his senior year at high school. Whether that connection ended upon his graduation at the end of the school year does not appear. He joined the Communist party in 1934 and continued to be a member of that party as it then existed in this country until 1937, when he left the party. After 1937, at some date not stated, applicant joined and remained a member until 1940, when, according to his own declaration, he found the protestations of the leaders of the party as to their interest in man as an individual were false. He decided, so he declared, that the interest of the leaders was in their own welfare and so he left. This is his declaration. There is no other evidence in the record except that supplied, as to membership in the Communist party, by applicant.

The opinion of the majority points out that the Communist party was regarded in a far different manner during the time applicant was a member of it than at the present time. Applicant called the attention of the Board of Bar Examiners to the fact that in the year 1948, and years prior thereto, there was a national Communist ticket. Evidence of membership in the Communist Party at a time fourteen years and more before the application to take the bar examination and with additional evidence that within that fourteen year period applicant took a solemn oath in the armed service of the United States of America to uphold and defend the Constitution and laws of this country and spent more than three years of such service as entitled him to an honorable discharge from the armed ranks, is not sufficient, in my opinion, to show want of good moral character of the applicant; and this is particularly true when it is shown that during the five years immediately preceding the date of application the applicant was of good moral character. at two educational institutions he attended dur-

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ing that time, and in the communities where he lived, three years having been spent at the law school at the University of this state.

If the evidence in this case leaves any lingering suspicion that applicant may still in his beliefs cling to Communist theories, I think that the least that could be done about the matter of his eligibility to take the bar examination would be to bring him, with his legal representative and members of the Board of Bar Examiners, before the court for such representations as might be made as to the present activities of the applicant as to subversive matters.

The majority makes much of the writing of a letter by applicant to his wife in 1944 after applicant had been in the armed services of this country for approximately a year and while he was on his way to the South Seas to fight and die, if necessary, for his country and for those of us who were unable to fight for ourselves. In that letter written to his wife, applicant spoke with high praise of the Fair Employment Practices Commission and charged that white supremacy is a tool of southern bourbonism to continue in power at the expense of the south itself and the nation as a whole and said:

"Jim-Crow is on a par with Anti-Semitism, anti-Catholicism, anti-Communism. In a democracy one cannot discriminate against a minority."

Later, in the same letter, applicant wrote that all the above "anti's" are:

"... most dangerous and stupid mistakes for Americans to make. They violate Christian ethics as well as all other ethical principles that recognize the brotherhood of man. To top it all off, consider them immoral."

This letter speaks only of mental attitudes and beliefs. It is not difficult for me to understand how a young man,

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recently married, might display an ambitious desire to appear as a great philosopher to his recently wedded sweetheart from whom he must now be separated for a time. Though I cannot subscribe to the philosophy expounded by the writer as to some of his declarations, I think he might have been speaking of matters as he understood them to be at the time. Both Republicans and Democrats at that time were naturally opposed to the Communist party, but all recognized that it was the legally qualified exponent of its beliefs to the electorate of the United States.

I do not think this letter was inadvertently offered in evidence by applicant's attorney. It is unfortunate that death has removed the attorney for applicant and he cannot now tell us why the letter was offered in evidence; but I think it was offered for the same reason applicant so freely told the members of the Board of Bar Examiners of his life's activities from the time he began working at nine years of age until he completed his educative efforts which brought him to the point of readiness to take the bar examination.

I think applicant was denied the privilege of taking the bar examination on the suspicion that he still has beliefs of Communism as it is now known to exist rather than as known to exist at the time applicant was a member of the Communist Party. When applicant left the Communist party, he used language quite like that used by Mr. Justice Jackson at one place in his opinion in *Communications Association v. Douds*, 339 U. S. 382. The opinion just referred to concurs in part with the majority opinion and dissents in part. The majority opinion points out certain declarations of Mr. Justice Jackson with all of which I fully agree; but in that opinion the writer was speaking as of May 8, 1950, the date of the decision, and not as of 1944.

The opinion of the majority quotes from the opinion of Mr. Justice Jackson in *Communications Association v. Douds*, *supra*, a declaration made by Mr. Justice Jackson

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as to what the Communist party actually is and the principles for which it stands. The case before the court and on which Mr. Justice Jackson wrote was one brought to test the constitutionality of the National Labor Relations Act as amended in 1947. The act provided that the board would not investigate any question affecting commerce concerning representations of employees raised by a labor organization and that no such petition would be entertained unless there be on file with the board an affidavit executed in the time stated, by the officers of such an organization that the officer was not a member of the Communist party or affiliated with such party and,

“ . . . that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.”

Having considered the Communist party and the propriety of the requirement as to membership in the Communist party, Mr. Justice Jackson wrote:

“I conclude that we cannot deny Congress power to take these measures under the Commerce Clause to require labor union officers to disclose their membership in or affiliation with the Communist Party.”

Turning to the requirement of the oath as to a belief of the officers of the union Mr. Justice Jackson wrote boldly of his belief in fundamental constitutional principles. Among other things:

“Progress generally begins in skepticism about accepted truths. Intellectual freedom means the right to re-examine much that has been long taken for granted. A free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert. The danger that citizens will think wrongly is serious, but less dangerous

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than atrophy from not thinking at all. Our Constitution relies on our electorate's complete ideological freedom to nourish independent and responsible intelligence and preserve our democracy from that submissiveness, timidity and herd-mindedness of the masses which would foster a tyranny of mediocrity. The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

The next quotation we take from this opinion of Mr. Justice Jackson upon which the majority placed considerable reliance expresses in very splendid language, very clearly, the idea of which applicant in this case had formed as he stated it and which he said was his reason for leaving the Communist party. The applicant said he came to the realization that the beautiful words declared by the leaders of the Communist party showed a lack of interest in the individual and a desire for power on the part of the leaders and the leadership did not care what happened to the other people. Having so concluded he said that he finally and definitely left the Communist party. Mr. Justice Jackson states:

"The idea that a Constitution should protect individual nonconformity is essentially American and is the last thing in the world that Communists will tolerate. Nothing exceeds the bitterness of their demands for freedom for themselves in this country except the bitterness of their intolerance of freedom for others where they are in power. An exaction of some profession of belief or nonbelief is precisely what the Communists would enact—each individual must adopt the ideas that are common to the ruling group. Their

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whole philosophy is to minimize man as an individual and to increase the power of man acting in the mass. If any single characteristic distinguishes our democracy from Communism it is our recognition of the individual as a personality rather than as a soulless part in the jigsaw puzzle that is the collectivist state."

It strikes me that applicant in this case at the time he left the Communist party was thinking along the same straight lines, and that his rebirth to the principles of democracy is no more strange than his passing from disbelief in God to faithful adherence to the religion of his birth.

In the opinion of the majority in *Communications Association v. Douds*, supra, Mr. Chief Justice Vinson wrote:

" . . . In this legislation, Congress did not restrain the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs. Compare *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943). Section 9(h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of the public by members of the described groups."

The few of whom the court there spoke were officials of labor unions and they were the only members of labor unions as to whom an oath as to affiliations or beliefs was required.

The full opinion as written by Mr. Chief Justice Vinson was concurred in by three members of the court. Mr. Justice Frankfurter concurred in all portions of the opinion

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except that numbered 7 to which he dissented. This is not important to consider in our case.

Mr. Justice Black begins his dissenting opinion in *Communications Association v. Douds*:

"We have said that 'Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind.'"

Again Mr. Justice Black said:

"Since § 9(h) was passed to exclude certain beliefs from one arena to the national economy, it was quite natural to utilize the test oath as a weapon. History attests the efficacy of that instrument for inflicting penalties and disabilities on obnoxious minorities. It was one of the major devices used against the Huguenots in France, and against 'heretics' during the Spanish Inquisition. It helped English rulers identify and outlaw Catholics, Quakers, Baptists, and Congregationalists—groups considered dangerous for political as well as religious reasons. And wherever the test oath was in vogue, spies and informers found rewards far more tempting than truth. Painful awareness of the evils of thought espionage made such oaths 'an abomination to the founders of this nation', *In re Summers*, 325 U. S. 561, 576, dissenting opinion. Whether religious, political, or both, test oaths are implacable foes of free thought. By approving their imposition, this Court has injected compromise into a field where the First Amendment forbids compromise.

"The Court assures us that today's encroachment on liberty is just a small one, that this particular statutory provision 'touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint.' But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority. Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their be-

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ginnings, generate hatreds and prejudices which rapidly spread beyond control. Too often it is fear which inspires such passions, and nothing is more reckless or contagious. In the resulting hysteria, popular indignation tars with the same brush all those who have ever been associated with any member of the group under attack or who hold a view which, though supported by revered Americans as essential to democracy, has been adopted by that group for its own purposes."

The quotations are taken from both Mr. Justice Jackson and Mr. Justice Black because I understand the majority of this court to rely solely on the proposition that at one time in his life, at least fourteen years before applying for admission to the bar, applicant was a member of the Communist party.

No evidence appears in the record that in the year 1954 applicant was or had been for a period of fourteen years a member of the Communist party.

In the record of the hearing held at Albuquerque this question was asked of applicant with the answer that follows:

"Q. Regardless of whether it is Malencoff or Stalin or the Twelve Apostles in charge of the Communist party, if you took that oath you cannot be a Communist, is that right? A. I am not a Communist."

The oath referred to in the question is the oath required of an attorney being admitted to the bar.

We quote from that record again:

"Q. Now then, that leads me down to this question concerning yourself, you stated that you left the Communist party because of your having reached the conclusion that the aims of those in charge of the policies of the Communist party were personal advancement and what not, rather than a belief in the principles,

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basic principles of the Communist party. That to me still leaves a doubt in my mind as to whether or not you still believe in the basic principles of the Communist party so that if at some time, let me ask you this question, suppose that the ruler of Russia today were to be overthrown and to the eyes of the Communist, the control of the Communist party was restored to sincere Communists, those that believe in principles of Communism, that condition existed, do you still believe in those principles to the extent that you would again join the Communist party? A. Never, never!

Q. And then you say that you are not only, while you may have left the party originally because you didn't believe that the leaders were sincere, you now say that you do not believe in the principles of Communism? A. I am saying, Judge, that for myself I would never join the Communist party. I would never join the Communist party."

In *Dennis v. U. S.*, 341 U. S. 494, the United States Supreme Court in an opinion by Mr. Chief Justice Vinson, discussing the Smith Act, said:

"The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas.' He further charged that it was not unlawful 'to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence.' Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged."

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Mr. Justice Frankfurter in the Dennis case, *supra*, in a concurring opinion, wrote:

"No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas.

"We must not overlook the value of that interchange. Freedom of expression is the well-spring of our civilization—the civilization we seek to maintain and further by recognizing the right of Congress to put some limitation upon expression. Such are the paradoxes of life. For social development of trial and error, the fullest possible opportunity for the free play of the human mind is an indispensable prerequisite. The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes."

There is an appendix to the opinion of Mr. Justice Frankfurter pointing to opinions holding that speech cannot be restricted constitutionally unless there would result from it an imminent—close at hand—substantive evil.

The cases cited and quoted from illustrate the view taken by the highest court of the land as to any effort to control the thought processes of any individual. A mere belief in some proposition which is not orthodox when viewed from the standpoint of most people is not sufficient to condemn

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one as of bad moral character. The quotation taken from the majority opinion in *Communications Association v. Douds*, supra, shows clearly that it is not membership alone in a party which was condemned. The oath required by the statute was of only a few individuals in that party who were in a position of leadership and whose authority and position might enable them to lead the masses of adherents to the beliefs and doctrines of that party to forcible action against the government.

In the recent case entitled "In the Matter of Application of Ben G. Levy for Admission to Practice in the United States District Court, Southern District of Texas" the application was first considered by three District Judges. The matter involved the good moral character of applicant and nothing else. Applicant was a member of the bar of the State of Texas. The charge upon his character was based on the fact that he had been associated with an attorney practicing in the courts of Texas who was generally reputed to be a member of the Communist Party. Applicant was denied admission to the District Court and thereupon took an appeal to the Court of Appeals where the judgment of the lower court was affirmed. Next the matter was taken to the Supreme Court of the United States where the following opinion was rendered:

"Per Curiam: The record in this case discloses no sufficient grounds for the failure and refusal of the District Court to grant petitioner's application for admission to the bar of that Court. The judgment of the Court of Appeals is accordingly reversed with direction to remand the cause to the District Court for appropriate action in accordance with this order." (Advance Reports of the Supreme Court of the United States, Lawyer's Edition, Vol. 99, No. 10, page 470, April 25, 1955.)

A very recent case involving moral character of an applicant for admission to the bar of the State of Florida, is

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Robert C. H. Coleman, Petitioner, v, Olin E. Watts, et al., constituting the Board of Bar Examiners of the State of Florida and Guyte P. McCord, as Secretary of the Board, filed May 11, 1955, rehearing denied June 3, 1955, 81 So. 2d 650.

In that case it is shown that applicant is an attorney duly admitted to practice in the courts of Ohio. In October, 1953, applicant filed an application for permission to take the bar examination. In further stating the facts the Supreme Court of Florida said:

“ * * * the Board presumably developed certain information concerning petitioner's moral fitness, which was derogatory in nature, and Coleman was requested to appear before the Board on March 12, 1954, for interrogation. At that time, and upon a later occasion, questions were propounded to Coleman by Board members on a wide variety of subjects, including the amounts and sources of his income for past years, and taxes paid thereon; his net worth; his past employments; his business transactions and his associates during his residence in Naples, Florida, since 1946; his personal relationship with his employer's wife at that time, and the purported receipt of a gift of a house by deed executed by the wife containing restrictions on disposition at her option. Inquiries were also made as to whether or not the petitioner had ever engaged in 'kickback' business transactions in connection with his work in real estate development at Naples, and whether or not he had served illegitimately as a 'tax front' for certain business associates.”

The petitioner was the only witness; all derogatory allusions or derogatory accusations were flatly denied by him.

Again we quote from the opinion:

“ * * * the Board members did not at any time specify, either generally or specifically, what acts of malfeasance, if any, had been reported to it of which the peti-

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tioner might be guilty. Thereafter, the petitioner was informed by the Board that his application to take the examination had been denied because 'he did not meet the requirements for admission to the Florida Bar', but that he might avail himself of the privilege of a rehearing by producing before the Board, within a sixty-day period, 'new and additional matter which had not previously been considered.' "

After being so advised by the Board the petitioner took the matter to the Supreme Court by certiorari to secure review of the ruling of the Board. Again we quote from the opinion:

"Upon the allegations of the petition, which have been set forth here only in substance, the petitioner charged that the Board, in denying him the right to take the examination without at least informing him of the *general* nature of the complaints and charges and allowing him an opportunity to refute them, 'did not proceed according to the essential requirements of the law, exceeded and acted without jurisdiction or authority in the premises, illegally and unlawfully took away (from) and denied to . . . petitioner a right granted to other members of the class of which petitioner is a member and denied petitioner the due process of law."

The court considered the cases found in the annotations to 28 ALR 1140 and 72 ALR 929 and discussed cases from Oregon, California, Wisconsin, Montana, Georgia, West Virginia, New York, the Court of Appeals for the District of Columbia, Indiana, and North Carolina. We now quote the principles relied on in that case for quashing the ruling of the Board of Bar Examiners and directing that a hearing be afforded applicant in conformity with the principles stated in the opinion.

"It would seem, then, either by virtue of specific holdings, or by necessary implication, in the many

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cases dealing with the point, that where a court is asked to review the merits of a board's rejection of an application for admission to the bar, annotations 28 A.L.R. 1140, 72 A.L.R. 929, it is incumbent upon the board to sustain its ruling by *record* evidence and not by mere assertions that it is possessed of confidential information which shows the applicant to be unfit; and if the record consists only of evidence supplied by the applicant, then such evidence must demonstrate that the board's dissatisfaction with his application rests on valid grounds and not upon mere suspicion. Although the burden is always upon the applicant to 'satisfy the Board of his or her moral standing', we have the view that when he has made the prima facie showing required by the statutes and rules governing admission to practice, "it is incumbent upon those making objections to offer evidence to support the same and to overcome the prima facie showing made by the applicant. It is not for the applicant to prove the falsity of the charges made against him." While the burden of proof never shifts, the burden of proceeding does."

I feel confident that the record before us does not show conclusively or even persuasively that the proceedings of the Board of Bar Examiners met the tests, stated in the quotation, and which are approved by the cases cited in the opinion.

Applicant in our case was denied the privilege of taking the bar examination at the time of his appearance before the Board sitting for that purpose, as he had been advised previously that he might take the examination at that time. The board had before it certain information undisclosed to applicant which led the Board to hold an interview with him and to make certain inquiries of him of which no record was made except a record of a motion carried unanimously by the Board to the effect that applicant be denied the privilege of taking the bar examination because of subversive activities, aliases and arrests. He was not then

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advised, as I understand, of any reason for the questions which were asked him and he was not told the substance, even, of anything contained in the "Confidential File." At the hearing held in Albuquerque, the applicant by his attorney asked for information as to the contents of the "Confidential File" held by the Board. He was informed that he could not have that and the hearing proceeded so far as anything against the applicant is concerned upon his statements only. There is a statement made by the Bar Examiners which is before the court that the Board did not rely upon the confidential information in reaching its decision but based the decision upon the statements by the applicant. As said above the applicant was denied the privilege of taking the examination when he appeared for that purpose. The result of the hearing at Albuquerque was the affirmation of its previous action in refusing to permit the applicant to take the examination. In this court, applicant has complained of the failure to allow him to know about the reports in the "Confidential File."

There is one other reliance for its action by the Board in its denial to the applicant of the privilege of taking the bar examination and that is the arrests of the applicant.

It is true applicant was arrested several times, but he was never tried or convicted for anything. He has no criminal record and it has been many years since he was last arrested.

If one were on trial for a criminal action, mere arrests without convictions would not be shown for any purpose. For impeachment a defendant may be asked if he ever has been convicted of a misdemeanor or a felony. The details of the proceedings leading to a conviction are not admissible as evidence. It seems to be a fact that applicant disclosed the fact of his arrests in explaining the use of an alias at different times. Since the record does not show any evidence of a fraudulent purpose in the use of an alias,

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bad moral character cannot be established thereby. Just as a consideration of aliases is wrong in the absence of a showing of fraudulent intent, so is the consideration of arrests many years ago when there were no charges filed in some instances and no convictions ever. The good moral character of an individual may be attacked if put in issue by proof of his general reputation in the community for any damaging trait. It is not to be established by specific instances of what may be, or may be thought to be, wrongful acts. Proof of a general reputation of bad character at a remote time is not admissible.

There is nothing in the record to show want of good moral character since January, 1943. There is little if anything in the record other than applicant's beliefs, to show bad moral character at any time. There is only one act of applicant's life, which suggests criminal conduct and that was when he was soliciting others to go to Spain with him and to there enter the Loyalist Army of that country. Applicant said he did not know the statute was in existence at the time he was asking others to go with him to Spain to enlist. It is not surprising that he did not know of the statute. There are many of us all over this country to whose attention that statute had not been called until necessity for its consideration arose.

I have referred above to the "Confidential File." It is pointed out in the majority opinion in this case that I am the only member of the court who had read the "Confidential File." In this connection I feel justified in saying that by assignments this case first came to me for writing an opinion. On beginning to study the case, I undertook to read and did read every paper in the files, including the "Confidential File." I not only read the instruments once, I have read all of them, including the "Confidential File", several times. The result of my studies at that time led me to prepare a memorandum suggesting that this court

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call before it the applicant with his attorney and the members of the Board of Bar Examiners for further consideration of the matter. The other members of this court did not agree with me but concurred in the opinion to which I now dissent.

I think applicant was entitled to know at least the substance of any derogatory information given to the Board of Bar Examiners in the "Confidential File." I think every member of this court owes it to the applicant, on review here of the action of the Board of Bar Examiners, to know the contents of the "Confidential File."

I do not believe that the applicant has been accorded the rights of freedom guaranteed him by the Federal Constitution or by the State Constitution or that he has had due process, by the proceedings had.

That which I have said in this opinion is in no way a criticism of any member of the Board of Bar Examiners or of that Board. All men make mistakes. I know the members of this Board individually and am sure that no member of the Board would consciously or intentionally do any applicant a wrong. I appreciate also the sacrifice of time and effort which the examiners must make in order to hold the examinations and pass upon the eligibility of applicants for admission. In this case, however, I think an error has been made and that it should be corrected by an order of this court directing the Board of Bar Examiners to permit applicant to take the bar examination.

For the reasons above stated, I dissent.

s/ H. A. KIKER,
Justice.

*Appendix A.***(Opinion on Motion for Rehearing)**

McGHEE, J.

Petitioner in his motion for rehearing is chiefly dissatisfied with the type of hearing he was given in this court, asserting the court should have ordered a personal hearing before it and requesting now that such hearing be given. As stated in our opinion, a request for personal hearing was made by petitioner, but this request was withdrawn as being premature by letter of May 21, 1954. No further request for hearing was made and the case was presented to us, briefed and orally argued, all with reference to the record of hearing before the Board of Bar Examiners held July 16, 1954. The question presented to us was whether applicant had established his good moral character so as to entitle him to take the examination for membership in the bar in this state. Petitioner was given precisely the hearing before this court which he sought.

Petitioner is also dissatisfied because we did not rule whether former membership in the Communist Party alone establishes a lack or absence of good moral character. The answer to this is the question was not and is not now before us. We stated in our opinion and we reiterate here:

"We believe one who has knowingly given his loyalties to such a program and belief for six to seven years during a period of responsible adulthood is a person of questionable character."

This conduct of petitioner, together with his other former actions in the use of aliases and record of arrests, and his present attitude toward these matters, were the considerations upon which application was denied.

In connection with the matter of the arrest in Detroit, Michigan, for violation of the Neutrality Act, we take this opportunity to dispel some doubt which may have arisen about the events leading thereto and the appropriateness

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of criminal prosecution under c. 321, #10 (1909), 35 Stat. 1089 (substantially the same as the present #959 (a), Title 18, U. S. C. A.).

Said #10 provides:

"Whoever, within the territory or jurisdiction of the United States, enlists, or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be fined not more than one thousand dollars and imprisoned not more than three years."

Mr. Justice Kiker in his dissent filed herein has asserted that petitioner's activities were not such that he could have been convicted under the statute. Either Mr. Justice Kiker has construed the statute in a manner at odds with the authorities (*Gayon v. McCarthy*, 252 U. S. 171, 40 S. Ct. 244, 64 L. Ed. 513 (1920); *United States v. Blair-Murdock Co.* (D. C. Cal., 1915) 228 Fed. 75, rev'd on other grounds (C. C. A. 9th, 1917), 241 Fed. 217, cert. den. 244 U. S. 655, 37 S. Ct. 742, 61 L. Ed. 1374 (1917), which interpret the words "hire or retain" as meaning "engage" in the clause reading, "Whoever . . . hires or retains another person to enlist or enter himself," and the word "himself" in this connection refers to its antecedent "another person"); or he has ignored the following portions of letters from petitioner to his wife, introduced in evidence as exhibits. From the letter of May 9, 1944, we read:

" . . . The question of my enlisting to fight on the side of the Spanish Republicans against, Franco, Hitler & Mussolini. Was in Detroit at the time. In my position as Secretary of the Wayne County Workers Alliance and also as Chairman of the Single Men's Unemployed League (more on this organization later) was

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very strategically placed for getting recruits to go across.

"And much as I hated it, because I was doing such a good job they kept on putting off and off my own date of departure; finally put my feet down and insisted I be allowed to go. By this time it was getting toward the end. Finances were low. Arrived in New York with two auto workers. Were given a weeks vacation.

"The boys were now going across without passports and stowing away on ships going to France. 'Twas a beautiful system elaborately worked out and couldn't have been successful if the crews weren't overwhelmingly sympathetic to the cause.

"Remember now as if it had just happened. There were 5 of us. Two from San Francisco, us three from Detroit. One morning the S. F. boys left and came back the next day. They had gotten caught. Were unfamiliar with ships. That afternoon the announcement, 'We will only be able to send four. One of you will have to go back home.'

"A simple problem in arithmetic and finances. Cost less to send one person back to Detroit than San Francisco. The choice was left to us as to which one goes back. The 3 of us flipped coins. Two tails and one head fell. I had flipped a head. Given a bus ticket back to Detroit. Cursing my hard luck went back and resumed where I had left off. Thus ends a tale of how not to get to Spain. Incidentally of the last four who left, only one of the Detroit boys lived to come back."

In a letter written May 13, 1944, petitioner described a friendship he had developed with a man named Pete Kowal in Detroit, and stated:

"In mentioning Spain, said that soon I would be going across, that some one would be needed to take my place, and that despite his lack of experience, thru diligent study he was capable of being that person, that it meant hard work, something he was used to, and besides wherever he went he would run into the same conditions as existed in Detroit.

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"He joined the party and decided to stick it out. From that nite we were inseparable. . . .

" . . . The next week the secretary we had wasn't doing so hot, ousted him and Pete elected in his place.

"Pete helped me with recruiting too. As a result he was arrested with me by the FBI on Feb. 6, 1940. Became a member of an exclusive club, the 59ers. All our prison numbers I believe started with 59."

Petitioner is also distressed over the fact the Board of Bar Examiners had access to certain confidential information already noted in our opinion and the fact the content of the file was not made known to him. As stated in our opinion, its author and the justices concurring therein at no time examined the content of this file. The sworn response of the Board of Bar Examiners to the original petition herein declared its recommendation was not based upon confidential information, but upon facts disclosed by petitioner himself. Petitioner is now merely seeking to read some prejudice to himself into the proceedings where there is none in fact.

No answer can now be made to petitioner's request he be advised as to whether he will be permitted to take the bar examination at some future date. The answer to such a request will depend upon the showing then made and how it may be viewed by the court.

Other matters argued upon the motion for rehearing are found to be without merit. The motion for rehearing is hereby denied. IT IS SO ORDERED.

S/ JAMES B. MCGHEE,
Justice.

We concur:

S/ J. C. COMPTON, C. J.,

S/ EUGENE D. LUJAN, J.,

S/ DANIEL K. SADLER, J.

Appendix A.

(Dissenting Opinion on Motion for Rehearing)

KIKER, J., dissenting.

The majority opinion, as I read it, permanently disqualifies the applicant from taking the bar examination. The language which I so interpret is quoted in the opinion on the Motion for Rehearing and is as follows:

"We believe one who has knowingly given his loyalties to such a program and belief for six or seven years during a period of responsible adulthood, is a person of questionable character."

If now, after fifteen years of unobjectionable conduct, three years of which were spent as a soldier in the service of the United States of America overseas, the applicant is a man of questionable character, then for him there can be no hope. If a man who became a member of a junior affiliate of the Communist party at the age of eighteen and later moved into the Communist party until he was twenty-six years of age, when he permanently separated from that party, is now of questionable character, even though during all of the years just mentioned the Communist party was recognized as much within the law as was the Republican party or the Democratic party, then it must be true that the individual will never be able to establish a character among his fellows which could justify his association with respectable people or his admission to any of the learned professions.

It is difficult for me to understand how the majority can seriously argue that the use of aliases, without intent to do harm to any individual or group of individuals, could so besmirch a man's character that he will be forever unfit for association with the respectable part of any community. It is, moreover, difficult for me to appreciate how the majority arrives at its conclusion that any number of arrests

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without a conviction of any offense whatever can forever condemn a man as one of questionable character.

In the discussion in the majority opinion of the arrest of the applicant at Detroit, Michigan, in 1940 for violation of the Neutrality Act, my name is used again, and it is suggested that I have entirely overlooked pertinent authorities or that I have failed to read certain letters written by the applicant in the year 1944 when he had taken the oath required of all soldiers and was enlisted in the service of our country. These letters do no more than expose to applicant's wife, five years after he had severed all connection with the then lawful Communist party, some of his activities in that party. In the majority opinion two cases are cited as instances of authorities which I may have overlooked in expressing my dissent to the original opinion of the majority in this case.

The first of these cases is *Gayon v. McCarthy*, 252 U. S. 171, 40 S. Ct. 244, 64 L. Ed. 513 (1920). In that case the appellant, Gayon, was indicted in the Southern District of Texas for conspiring with one Naranjo of San Antonio, Texas, and of one Mendoza of Laredo, Texas, to hire and retain Foster Averitt, a citizen of the United States, to go to Mexico, there to enlist in the military forces organized in the interest of Felix Diaz then in revolt against the government of Mexico, with which the United States was at peace, in violation of what is called the Neutrality Act.

Gayon was arrested in New York and was held by a commissioner, subject to order of the District Court for his removal to Texas. Next, by petition for writs of habeas corpus and certiorari the case was removed to the District Court for the Southern District of New York; and there the Court discharged the writ of habeas corpus and entered an order and warrant issued for the removal of the appellant to Texas. The appeal was taken to the Supreme Court of the United States.

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The Supreme Court said:

"If there was before the Commissioner or District Court evidence showing probable causes for believing defendant guilty of having conspired with Naranjo or Mendoza, when he was in the Southern District of Texas, to hire or retain Averitt to go to Mexico to enlist in the insurgent forces operating under General Diaz against the Mexican government, the order of the District Court must be affirmed."

The Court examined the evidence. That before the commissioner was merely the indictment against the defendants and the admission by Gayon that he was the person named therein. The Court held that this established a prima facie case.

Thereupon, the testimony of the accused and of one Del Villar was offered by appellant and that of Averitt by the government. This evidence showed that Del Villar, a political exile from Mexico, had maintained offices in New York, from which he had conducted a systematic propaganda in the interest of Felix Diaz and against the Mexican government; that Gayon was a Mexican citizen and throughout several administrations prior to that of Carranza had served as consul for the Mexican government at several places within and without the United States, one of these being at Roma, Texas. For about two years Gayon had been in the service and pay of Del Villar and General Aurelio Blanquet, the latter being in Mexico with the forces of Diaz. Naranjo was editor and publisher of "Revista Mexicana", a newspaper at San Antonio, Texas, the paper being opposed to the established Mexican government and favorable to Diaz and his interests.

There was much correspondence between Gayon from New York to Naranjo at San Antonio. The correspondence disclosed that Gayon, although in New York, was in close association with Naranjo and that the two were engaged

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actively in promoting opposition to the established Mexican government. In January, 1919 Foster Averitt, an American citizen living in Texas, called at the office of Gayon. Averitt had recently resigned from the United States Naval Academy and was without employment. His purpose in calling on Gayon was to secure, if possible, a position in Mexico or Central America as an engineer. Among other things, he expressed his desire to see Generals Diaz and Blanquet personally. He asked for letters of introduction to these men. Gayon refused until he could confer with Del Villar. Averitt called again and discussed with Gayon conditions in Mexico near the border and the means of his going to Mexico and later received from Gayon two letters, one addressed to each of the generals above named. Gayon asked General Blanquet to supply Averitt with necessary information to enable him to make his trip into Mexico. He also asked that Averitt be introduced to General Diaz. In the letter he also requested the general to write as often as possible to enable "us to continue our campaign of propaganda". Having received these letters, Averitt went immediately to San Antonio where he presented the letter to Naranjo who gave him a letter to General Mendoza at Laredo. This letter was presented to Mendoza and through him arrangements were made for Averitt's crossing into Mexico with two or three others, but they were arrested by customs guards and the proceedings followed.

In the interviews had in New York there was suggestion of payment of expenses and a commission for Averitt, but Gayon said that the furnishing of either would violate the neutrality laws of the United States, but that there would be no difficulty in his getting a commission from General Blanquet on his arrival in Mexico and also said "that he expected that he should be at least a colonel when he saw him again down there". Gayon also said to Averitt that it might be possible to have his expenses made up to him

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when he arrived in Mexico, and, as a matter of fact he received \$15 from General Mendoza at Laredo.

As said above, the charge was conspiracy and the overt acts stated in the indictment were that Gayon delivered to Averitt in New York a letter addressed to Naranjo with instructions with respect to presenting it, and impliedly promised Averitt that upon his arrival in Mexico he would be given a commission in the Army of General Blanquet and he also gave Averitt a letter to General Blanquet who was then in Mexico in command of revolutionary forces; that Averitt visited and held conferences with Naranjo who gave him a letter to Mendoza at Laredo in the southern district of Texas; and that Averitt called upon Mendoza and arrangements were made for him to enter Mexico with the intent to join the forces of Diaz under General Blanquet. The court says that it is evident that Gayon entered into the engagement by the promise that he would be given a commission in the forces of Diaz when he arrived there and that he would probably be reimbursed for his expenses.

This case was not concerned with the guilt of Gayon. The question was whether he should be removed to the southern district of Texas and the court held that there was a case against him to be tried in the southern district of Texas. Instead of undertaking to quote a few words from the opinion out of the context for the purpose of explaining the meaning of the words "hire" or "retain", I quote from the opinion following:

"The word 'retain' is used in the statute as an alternative to 'hire', and means something different from the usual employment with payment in money. One may be retained, in the sense of engaged, to render a service as effectively by a verbal as by a written promise, by a prospect for advancement or payment in the future as by the immediate payment of cash."

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The second of the cases cited in the majority opinion is Blair et al v. U. S., 241 Fed. 217, cert. den., 144 U. S. 655, 37 S. Ct. 742, 61 L. Ed. 1347.

In this case, plaintiffs in error to the Circuit Court of Appeals, 9th Circuit, were charged by indictments in the District Court with conspiracy to violate the Neutrality Act.

The case was presented upon an agreed statement of facts and the trial court literally instructed the jury to return a verdict of guilty against the defendants. The Circuit Court reversed the judgment of the lower court and remanded the case for a new trial. From the opinion I quote:

"It will be readily seen, not only from the stipulation itself, but from the foregoing declaration contained in the bill of exceptions, that there was no agreement between the parties in regard to any inference or deduction to be drawn from the actual facts agreed on. Obviously, all such inferences and deductions were left to be drawn, and only could be properly drawn, by the jury upon submission of the case to them, after opportunity of argument by the counsel of the respective parties. It might have been, and doubtless would have been, argued to the jury, as it is argued here to this court, that the agreed statement of facts wholly fails to show that the present plaintiffs in error, or, indeed, any of the defendants to the indictment, ever within the territory of the United States, conspired to 'hire or retain,' or ever did 'hire or retain,' any of the persons named in the indictment, or any other person or persons, to go beyond the limits and jurisdiction of the United States with the intent or purpose specified in the indictment. The defendants thereto might well have contended before the jury, as the plaintiffs in error do here, that what they did, as shown by the agreed statement of facts, was in effect to aid and assist the persons referred to in the indictment and in the agreed statement of facts to go beyond the limits of the United

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- States with the intent and for the purpose charged, and was in no respect the hiring and retaining them prohibited by the statute."

There is certainly nothing in either of the cases which causes me to change my opinion as to the possibility of a conviction of the applicant in the case now before this court if he had been tried following his arrest at Detroit. I think the prosecuting attorneys, including, as the record in this case shows, the Attorney General of the United States, were aware of the situation and of the evidence which could be adduced. After about ten days following the arrest, applicant was released and, as shown by the record, the case was never thereafter called to trial and, as pointed out in the majority opinion, was dismissed.

After diligent search, I have been unable to find anything which convinces me that the applicant, Mr. Schware, could have been convicted if there had been a trial following his arrest. The record before us does not show that anything was paid by the applicant to anybody else or that the applicant made any promise of anything to any other person by way of compensation or reward to be paid in the future. Somebody advanced some money to the four men who wanted to go overseas while they were in New York, but that certainly was not Schware. When it was found that the four men could not stow away and reach Spain, and that only three could go, the one who must return home was selected by tossing coins and the applicant was the one who must return home. Somebody gave them the money to pay for his transportation and he returned.

The record shows nothing in the indictment as to its contents. The record names no individual who was hired or retained or engaged, or whom the applicant sought to hire or retain or engage. It is not shown by the record before us that applicant ever succeeded in causing anybody to

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enlist or enter himself in the United States, in the service of a foreign country.

Evidently, the four who reached New York were acting in concert, one as anxious to get over to Spain as the other.

I have previously read the letters set out in the latest majority opinion and find nothing to change my mind as to this case. Both letters, set out in part in the latest majority opinion, were written in 1944, at a time when the applicant was a soldier in the service of his country. Each of these letters speaks of that which occurred in or prior to the year 1940.

In the majority opinion it is again asserted that neither the author nor any of the justices concurring have at any time examined the file of what is called "Confidential Information." It is also again declared that the Board of Bar Examiners has stated that the recommendation to the court was not based on confidential information, but upon facts disclosed by petitioner himself. In the majority opinion this is found with reference to the confidential information: "Petitioner is now merely seeking to read some prejudice to himself into the proceedings where there is none in fact." It must be assumed, I think, that the Board of Bar Examiners, having notified the applicant that he could take the examination on a certain day, undertook for some reason upon his appearance on that date for the purpose of examination, to call him before the Board and interrogate him. Just what the interrogation was about at that time and to what extent it went and just what answers Mr. Schware made does not appear. What was that reason? Could it have been on account of the substance of that which is called "Confidential Information"? The application of Mr. Schware had been in the hands of the Clerk of the Board for a considerable length of time. There must have been some reason for Mr. Schware's interroga-

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tion at that time and his being denied the right to then take the examination. As I understand this situation, applicant is now denied the right to take the bar examination because of the hearing in Albuquerque.

That matter has been sufficiently discussed, I think. I am now strengthened in my belief that it is not only the right but the duty of the members of this court to know everything, including the "Confidential Information" placed before the Board of Bar Examiners.

I quote from the majority opinion overruling applicant's motion for rehearing:

"No answer can now be made to petitioner's request he be advised as to whether he will be permitted to take the bar examination at some future date. The answer to such a request will depend upon the showing then made and how it may be viewed by the court."

To me this statement is indeed strange. Bearing in mind that since 1940 the applicant has lived a life with which no fault has been found and as far as the record shows, no fault can be found; remembering also that during this fifteen-year period applicant has served a period of three years in the U. S. Army, being there required if need be to lay down his life for those of us who are either too old or too infirm to go into the armed services in defense of our country and that he so served that he received an honorable discharge; and remembering that thereafter he proceeded from his high school accomplishments to acquire such education as qualified him to take the Bar Examination in our state except for a character showing, I inquire if fifteen years of blameless life is not long enough to establish his good character, how long will it take?

Remembering the applicant is now forty-one years of age and desires to enter, at that late time, upon the practice

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of law, if another fifteen years of life with no wrong doing shall pass, will applicant then be of such character as to enable him to take the bar examination? Assuming the applicant will in the future live a blameless life there can be no record before the Board of Bar Examiners at any future date which will differ in any material respect from that placed before the Board and this court.

It will always be a fact that in his youth and to 1940 applicant was affiliated with the then Communist party at a time when membership in that party cast no stigma on any individual.

It will always be a fact that applicant, on several occasions, before his father's death made use of an alias.

It will always appear that the applicant, in his youth, was arrested several times but never tried or convicted for any offense.

Under the majority holding, there can be no change of circumstances justifying permission to applicant to take the bar examination at any time in the future if he continues to live a life without misconduct.

The view taken of the present situation by the majority should lead to answering the applicant's question as to whether he will ever be allowed to take the Bar Examination plainly and positively—NO. No other logical result can ever follow the order of the majority than the refusal of an examination to the applicant any and every time he may apply. Should Mr. Schwere apply to take the bar examination in any other state or states, he would have to disclose this fact.

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I deeply regret that the Communist party was ever organized in the United States of America, but I would not condemn and leave helpless those who forsook the error of their ways and have for many years lived the kind of life lived by other people who are considered worthy citizens.

For the reasons expressed, I dissent.

S/ H. A. KIKER,
Justice.

APPENDIX B

Entry in the minutes of the Board of Bar Examiners, dated February 22, 1954:

"No. 1309, RUDOLPH SCHWARE. It is moved by Board Member Frank Andrews that the application of Rudolph Schware to take the bar examination be denied for the reason that, taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed" (Tr. 3).

The minutes of the meeting of the Board of Bar Examiners as a result of the hearing on July 16, 1954:

"The Board of Bar Examiners of the State of New Mexico convened in a special meeting at 2:30 p. m. on Friday, July 16, 1954, at Room 715 First National Bank Building, in Albuquerque, New Mexico, for the purpose of reconsidering the action taken by the Board of Bar Examiners in refusing permission to Rudolph Schware to take the bar examination at the February, 1954, meeting of the Board; that Rudolph Schware appeared in person and by his attorney, P. H. Dunleavy, Esq.; that evidence was produced in behalf of said Rudolph Schware and a stenographic record was made of said proceedings; at the conclusion of the hearing the Board, after due consideration of the evidence introduced, was of the unanimous opinion that the former determination should stand and affirmed its former action on the application of the said Rudolph Schware taken on February 22, 1954."

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DEC 17 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 92

RUDOLPH SCHWARE,

Petitioner,

v.

**BOARD OF BAR EXAMINERS OF THE STATE
OF NEW MEXICO**

**On Writ of Certiorari to the Supreme Court of the
State of New Mexico**

BRIEF OF PETITIONER

HERBERT MONTE LEVY,
Attorney for Petitioner,
c/o American Civil Liberties Union,
170 Fifth Avenue,
New York, New York,

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IN THE

Supreme Court of the United States

October Term, 1956

No. 92

RUDOLPH SCHWARE,

Petitioner,

v.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW MEXICO

On Writ of Certiorari to the Supreme Court of the
State of New Mexico

BRIEF OF PETITIONER

Opinions Below

The majority and minority opinions below, both on the original decision and on the motion for rehearing, are reported at 60 N. M. 304, 291 P. 2d 607.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1257(3), on the ground that the State of New Mexico, acting through respondent, deprived the petitioner of property (the right or privilege to practice

law) without the due process of law required by the Fourteenth Amendment to the United States Constitution.

The order reviewed herein was made and entered on September 7, 1955 (R. 127).¹ An order denying a timely motion for rehearing was made and entered on December 19, 1955 (R. 153). On March 16, 1956, Mr. Justice Clark of this Court granted an order extending the time for filing a petition for writ of certiorari up to and including May 17, 1956 (R. 163). The petition for writ of certiorari was filed on May 17, 1956. This Court granted certiorari on October 8, 1956 (R. 163), 352 U. S. —, 77 S. Ct. 34.

Constitutional, Statutory and Regulatory Provisions Involved

(a) *Constitutional Provision*—United States Constitution, Amendment XIV, Section 1, Clause 2: “ * * * nor shall any State deprive any person of * * * property, without due process of law.”

(b) *Statutory Provisions*—N.M.S. (1953 Comp.) § 18-1-8: “With the advice and approval of the Supreme Court, the board [of commissioners of the state bar] shall have power to constitute and appoint five (5) members of the state bar as a special committee to examine candidates for admission to the bar as to their qualifications, and to recommend such as fulfill the same to the Supreme Court for admission to practice under this act. The approval of the Supreme Court of such recommendations shall entitle such applicants to be enrolled as members of the state bar and to practice law, upon taking oath to support the Constitution and the laws of the United States and the State of New Mexico. Such special committee shall be known as the state board of bar examiners * * *” (Adopted as N. M. Sess. L. 1925, c. 100,

¹ Such references are to pages in the Transcript of Record in this Court.

§ 7, amended N. M. Sess. L. 1949, c. 22, § 1. Now found in N. M. S. (1953 Comp.), Vol. 4, pp. 84-85).

Neutrality Act of 1816, 18 U. S. C. § 959(a): "Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than \$1,000 or imprisoned not more than three years, or both."

(c) *Regulatory Provisions*—(Reference is to Rules Governing Admission to the Bar of the State of New Mexico, now found in N. M. S. (1953 Comp.) Vol. 4, pp. 85-89):

RULE I. *Qualifications*: "(1) * * * An applicant for admission to the Bar either upon examination or certification and motion must be a citizen of the United States, an actual bonafide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character * * *."

RULE III. *Examinations*: "(7) * * * Provided that the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character."

Questions Presented for Review

1. Whether a state may, consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution, deny an applicant for admission to the bar permission to take the bar examination, despite overwhelming evidence of the applicant's good moral character, because of (a) the applicant's past use of aliases though the said use of aliases was legal and in most cases was used in order to avoid racial discrimination and to exercise

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labor's right to organize; (b) the applicant's membership in the Communist Party in the remote past—though the applicant's membership was innocent of any knowledge of illegal purposes or other illegality on the part of the organization, was held at a time when there was nothing illegal about such membership, and the applicant since has offered his services in combating Communism to the Federal Bureau of Investigation; and (c) the mere fact that the applicant has been arrested in the remote past—though in no case was the applicant ever indicted, otherwise prosecuted or convicted.

2. Whether, even if the use of one or two of the standards set forth above in "1" under the said circumstances is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, the use of the other standard or standards which is inconsistent with the aforesaid due process clause does not invalidate the proceedings and require a new hearing.

3. Whether the examination by the Board of Bar Examiners of confidential information, neither said information (including the names of those who gave adverse reports) nor the nature nor a summary of such information being disclosed to the applicant before it arrived at its decision, is inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

Within two or three weeks after Rudolph Schware entered the University of New Mexico Law School in 1950, he voluntarily disclosed to the Dean of the Law School his past affiliations in Communist organizations. The Dean then raised no questions as to petitioner's eligibility to the bar, suggested that petitioner be silent on this subject at that time (R. 29, 40, 44, 45), and often gave his opinion to

petitioner that there shouldn't be any difficulty (R. 43). Had the application for permission to take the bar examination inquired as to past Communist affiliations, which it did not (R. 43), Mr. Schware would have fully disclosed them (R. 45). The application disclosed his past use of aliases and past arrests (R. 100, 104-5). All information adverse to Mr. Schware was "openly and freely disclosed" by him to the Board of Bar Examiners (R. 11).

In December 1953, petitioner filed with respondent his application for permission to take the bar examination in February 1954, and was originally advised that he was entitled to take the bar examination in February 1954 (R. 1). But, on appearing at the Supreme Court of New Mexico on February 22, 1954, he was advised by members of the respondent Board that he was not entitled to take the examination (R. 2). At that time, an informal hearing was had (R. 2). Respondent at no time made any claim that petitioner had not answered any questions fully, completely and accurately, either in his application or at his hearing (R. 1, 2, 90, 91).

At the conclusion of the informal hearing, petitioner was again advised that he was not entitled to take the bar examination (R. 2). No transcript of the testimony at said hearing was taken (R. 2), but the following minutes of the action taken by the respondent were recorded and made a matter of public record (R. 3, 91):

"No. 1309 ^BRUDOLPH ^SSCHWARE. It is moved by Board Member Frank Andrews that the application of Rudolph Schware to take the bar examination be denied for the reason that, taking into consideration the use of aliases by the applicant, his former connection with subversive organizations, and his record of arrests, he has failed to satisfy the Board as to the requisite moral character for admission to the Bar of New Mexico. Whereupon said motion is duly seconded by Board Member Ross L. Malone, and unanimously passed."

Petitioner thereupon asked an opportunity to appear personally before the Board, asking for the basis for its decision and requesting the names of any witnesses who may have given information adverse to him, and further asking to inspect the records and files dealing with such inquiry (R. 2). A special meeting of the respondent was then held on July 16, 1954, for the hearing (R. 2), at which he was for the first time given the above minutes of the February 22 meeting (R. 3).

At the July hearing, Schwere's attorney was advised for the first time that the Board had received confidential information against Schwere which it refused to disclose (R. 3, 9). One Board member stated that he didn't "*think* our action was motivated in any way by any accusations or anything (*sic*) was made against him or were disclosed in some way by a report" (R. 11). (Emphasis added.) However, while another Board member reiterated that his action was based on disclosures made by petitioner himself, it was stated that petitioner's counsel could not assume that there was nothing adverse in the report (*Ibid.*). The respondent has also stated that the information upon which it acted is "reflected" in the transcript of the July 16, 1954 hearing (R. 93), and that "the bases of the decision of the respondent * * * are not to be found in * * * confidential information, and that said decision * * * is based upon facts disclosed by the petitioner himself" (R. 92). At no time was either the confidential information, or its nature, or a summary thereof, or the names of witnesses against him, disclosed to petitioner (R. 2-3). Petitioner, in applying for a character report, had stated as follows: "I understand that I will not receive and am not entitled to a copy of the report nor to know its contents" (R. 105).

At the hearing, petitioner introduced evidence as to his good moral character, and also went into lengthy discussions of the facts regarding the three grounds relied upon by respondent in denying admission (R. 15-54). This is

analyzed in detail *infra*, at pages 8-13. The Board, however, affirmed its former action (R. 4).

Petitioner filed a petition to review the denial of his application to take the bar examination in the Supreme Court of the State of New Mexico (R. 1-6), asking that the Court be furnished all records dealing with petitioner's application, that it review the denial of the application, and for a judgment that petitioner be allowed to take the bar examination (R. 5). The Supreme Court of New Mexico, Mr. Justice Kiker dissenting, considered the matter "originally", stating that it was "not limited by appellate rules" (R. 106), but nonetheless lent great weight to the decision of the Board of Bar Examiners (R. 125). However, in an opinion denying motion for rehearing, in which petitioner had asserted that a personal hearing should have been had (R. 149), the Court stated that the case had been considered "all with reference to the record of hearing before the Board of Bar Examiners held July 16, 1954", and that the question was "whether applicant had established his good moral character" (R. 150). The Court gave the following as its basis for its original decision (*Ibid.*):

"Petitioner is also dissatisfied because we did not rule whether former membership in the Communist Party alone establishes a lack or absence of good moral character. The answer to this is the question was not and is not now before us. We stated in our opinion and we reiterate here:

'We believe one who has knowingly given his loyalties to such a program and belief for six to seven years during a period of responsible adulthood is a person of questionable character.'

This conduct of petitioner, together with his other former actions in the use of aliases and record of arrests, and his present attitude toward those matters, were the considerations upon which application was denied."

Pursuant to an order of Mr. Justice Clark of this Court extending time to file a petition for writ of certiorari (R. 163), the petition was filed on May 17, 1956. On October 8, 1956, this Court granted certiorari (R. 163).

A. The Affirmative Evidence of Petitioner's Good Moral Character

Background: Petitioner, the son of a penniless immigrant, began work when he was 9 years old (R. 17). His father, a socialist, brought his son up in a socialist atmosphere. Labor unions were petitioner's early concern, when he paid daily visits to the home of Sidney Hillman (President of Amalgamated Clothing Workers Union) during his childhood (R. 16, 17). Petitioner's father and mother were both atheists (R. 41-2).

At the hearing the petitioner presented the following affirmative evidence of his good moral character:

1. After entering the United States Army in January 1943 (R. 103), Schwere volunteered for the paratroopers (R. 27), and served therein as instructor (R. 62). While still an atheist, Schwere nightly read a chapter of the Bible to a fellow soldier who could not read very well, being the only man in his company who was willing to do this (R. 16, 77-8). (In civilian life, he had escorted a friend's sister to mass (R. 73).)

2. While in the military, he ceased being an atheist, and became religious (R. 30). He is now a firm believer in God (*Ibid.*, 42).

3. He received an honorable discharge from the United States Army (R. 103).

4. Upon his discharge, he remarried his wife in a religious ceremony; a civil ceremony only having been performed when he married her in 1944 (R. 12-13, 30).

5. Both Schware and his wife are members of the local synagogue (R. 30, 31). He wants his children to be religious (R. 42, 50). When his son was born in 1951, he had his son circumcised in the orthodox Jewish ritual known as the Bris (incorrectly referred to in the record as "Brist") (R. 31), by which a male child enters the House of God. His six year old daughter attends Sunday School at the synagogue (*Ibid.*).

6. After leaving the Communist Party, petitioner twice volunteered his services to the FBI in combating Communism (R. 26).

7. In 1950 petitioner established a small anonymous fund for indigent students at his law school, which he has continually kept up and intends to keep up (R. 31).

8. Petitioner presented letters of recommendation from each professor present at the then summer session of the University Law School (R. 32), and the Secretary of the Dean of the Law School testified as to his excellent moral character (R. 57-8).

9. Petitioner presented letters of recommendation from every student in his class whom he could reach with but one exception (R. 32).

10. The Rabbi of petitioner's synagogue confirmed Mr. Schware's evidence as to participation in orthodox religious activities, stated that he had a very high opinion of petitioner, that petitioner was devoted to the ideals of his religion, possessing a very high moral character. He further testified that the principles of Judaism are completely incompatible with those of Communism (R. 55-6).

11. A blind attorney who had attended law school with Mr. Schware testified that Mr. Schware had read to him

when his wife could not do so, and assisted him in many other ways, though many times this was most inconvenient to petitioner. He, too, confirmed petitioner's high moral character (R. 59-60).

12. In 1952, petitioner, upon having received a gift subscription to the People's World (the West Coast Communist newspaper), wrote the paper rejecting the gift subscription (R. 87). The petitioner, however, keeps himself informed on Communism by occasionally reading both Communist literature and the reports of the House Committee on Un-American Activities (R. 36-7).

13. While in law school, petitioner worked to support his wife and two children (R. 29).

B. Petitioner's Past Connection With the Communist Party

Petitioner, after being brought up in the said socialistic, atheistic background, joined the Young Communist League in 1932, when he was 18 years old, when he found that while the socialists in high school backed down when ordered by high school authorities to disband a discussion club, all the members of the Young Communist League stood up for their constitutional freedom of speech, which he thought was important, and refused to disband (R. 18, 19). In 1934, at the age of 20, he joined the Communist Party (R. 19), in opposition to his father's and mother's wishes (R. 19, 38, 39). When his father died in 1937, he came back to his home (R. 25), where his mother persuaded him to leave the Communist Party (R. 38). He rejoined it again, at an unspecified date, but quit the Party in the latter part of 1940 (R. 24-6), making a complete break (R. 52), and ceasing all his Party activities (R. 27). His disillusionment had begun in 1939 as a result of the Stalin-Hitler pact. It was completed in 1940 when he discovered that

he was being used, that the Communist Party was using the union organization of which he was an officer for its own purposes; he reached the conclusion that the aims of the Party were personal advancement of the leaders rather than a belief in principles, had no interest in individuals or principles, and that "those beautiful words (sic) wasn't so much" (R. 25-6).

Petitioner, then an extreme altruist (R. 80), had believed in the "beautiful words" of the Party (R. 25), the "fine" words (R. 33). When he was a member, members considered themselves as "American citizens" who were members of a legal political party (R. 45). He was such an undisciplined Party member that he brought a union he had organized into the American Federation of Labor instead of the Communist-dominated Trades Union Unity League (R. 34). His work in labor unions, while influenced by his Communist Party membership, had been carried on because of his belief in the importance of union activities, which did not in his opinion mean building the trade union movement for the Communist Party (R. 53).

His disbelief in Communist principles was gradual. It may possibly have been as late as *circa* 1944 when he finally repudiated the principles of the Communist Party (R. 51-2). He detests Communism and its principles because he is opposed to the doctrine that the state is all-powerful and the individual does not count, because religion is incompatible with Communism (R. 49), and because he knows the Party wants power, not principles (R. 25-6). He is a believer in capitalism (R. 48), who would never, never join the Communist Party again (R. 47). While he can take the attorney's oath to uphold the Constitution without reservation, he believes that no Communist today could do so without being untrue to all the principles of Communism (R. 47).

C. The Past Arrests of Petitioner

Petitioner was arrested on the following occasions:

(a) In 1934, petitioner was arrested in California on two occasions during the maritime strike of that year (R. 21, 104), on charge of suspicion of criminal syndicalism (R. 21, 22, 104). Though Mr. Schware was never taken before a judge, he was detained on each occasion from three to five days (R. 22, 104). Some two to three thousand persons were arrested during the course of that strike, about 200 of those persons being charged with criminal syndicalism (R. 21). He was never prosecuted, tried or convicted (R. 22). He made a special trip to California to obtain the information as to these arrests (R. 21).

(b) In 1940, he was arrested in Detroit on a charge of violation of the Neutrality Act of 1816 by recruiting soldiers for the legal Spanish Republican government to fight against Franco, Hitler and Mussolini during the Spanish Civil War (R. 22-3, 66, 104-5), which had been part of his activity as part of the Communist Party (R. 25, 35). The charges were nolle prossed (R. 23, 105). He had not realized that he was doing anything illegal, had done his recruiting openly (R. 23), mindful that Europeans had helped the American Revolution (R. 24). His activities consisted of attempting himself to enlist for the Spanish Republican Army and in persuading others to do so (R. 23, 67, 72).

(c) In 1940 or 1941, somewhere in Texas, petitioner was arrested on a charge of suspicion of transporting a stolen vehicle, despite the fact that he had papers in his possession which showed his agency for the owner. He was kept in jail for about three days and was refused permission to contact the owner of the vehicle. No charges were made and he was never tried or convicted (R. 24, 105).

D. The Use of Aliases

In his application for admission, petitioner stated that he used aliases on the following occasions: (1) when he went to work in 1934 in Gloversville, New York, he used an Italian name in order to obtain employment (Jews having considerable difficulty in getting work there in those days) (R. 19-20), and to facilitate unionization of the employees because a large number of them were Italian (R. 34, 35). Once the workers were organized they became affiliated with the American Federation of Labor. He left for his home in New York City and resumed use of his real name (R. 100); (2) he used an Italian alias to obtain employment in California shipyards, where no Jewish person ever worked (R. 20); (3) he used an alias in giving his name to the police after arrest due to labor trouble (R. 21). In 1937, when he was 23 years old, he ceased using aliases, believing that he should not be ashamed of the name of his father (R. 25).

He states that he does not intend to use an alias, that he never will, that he has no reason for it, and if there was a reason, he wouldn't (R. 37-8).

At no time was an alias ever used to deceive persons or to obtain financial benefits (R. 20-1).

SUMMARY OF ARGUMENT

I. The Lack of Substantive Due Process Below

In assessing petitioner's present moral character, the Court below rested entirely on events in Schwart's life that had taken place from fifteen to twenty years before the

¹ We have endeavored throughout this brief to avoid duplication of the arguments contained in Petitioner's Opening Brief in No. 5, Oct. Term 1956. Instead, to save the time of the Court, we hereby incorporate by reference the arguments therein insofar as they are applicable to this case. A copy of Petitioner's Opening Brief in No. 5 will be sent to counsel for respondent herein when service of this brief is made upon him.

instant proceeding began, making no attempt to evaluate the significance of his past as it relates to his present moral character. And only present moral character is the standard. The Court below nowhere even considered the possibility that fifteen years of life as a model citizen outweighed whatever errors petitioner had made in his youth. In short, it substituted a non-existent arbitrary standard of past moral character for the existing standard and by so doing violated due process. The only allusion it made to the present was a statement that it relied in part on Schware's present attitude towards his past arrests and past use of aliases, though the record shows no attitude towards either which could be in the least rationally considered as evidencing a lack of moral qualification. It completely ignored the overwhelming evidence of Schware's present fine moral character, thus laying down the rule that a man can never live down ancient events in his life, that he must be judged entirely by such ancient events, and that fifteen years of subsequent good life and good works are not to be even considered in determining the present moral fitness necessary to admission to the Bar. This surely does not comport with due process.

The arbitrariness and unreasonableness of the decision below is further demonstrated, and was further compounded, by the Court's finding lack of moral fibre through the utilization of retroactive political standards of judgment, and through its considering the *ex parte* acts of others and the innocent acts of petitioner as being reasonably related to the question of petitioner's moral character—all without weighing these factors against petitioner's unblemished record of fifteen years of uprighteous and moral behavior.

I. Substantive Due Process

Petitioner had been a member of the Communist Party between 1934 and 1940. He joined from idealistic motives; when he learned the true nature of the Party, his idealism caused him to break with it completely. To hold that past innocent membership in the Communist Party thus *per se* renders one of questionable moral character is to violate due process by indiscriminately classifying innocent with knowing activities. Moreover, in judging the degree of culpability to be attached to 1934-1940 membership, the Court below relied entirely on a judicial characterization describing the Party as it was in 1950, thus making not merely a political test, but a retroactive test as well. In addition, the Court below ignored the possibility of changes in view and affiliations, and ignored Schware's idealistic motivations in becoming and remaining a member of and in departing from the Party.

The Court below did concede that there was nothing illegal about the Communist Party during Schware's membership therein. Therefore, any adverse inference as to his bad moral character must have been based on some undefined aspect of the Communist Party which it considered immoral though not illegal. To so sit in judgment upon legal aspects of a political doctrine is to prescribe what is orthodox in politics for future members of the bar, whose independence is a prerequisite for societal functioning. Such prescription of orthodoxy is proscription of freedom of speech and association for our youth, who could not join a group today lest it be proscribed tomorrow—for even if they leave it as soon as they learn its evil side, they can never again prove themselves of the good moral character necessary to enter a learned profession. When this Court ruled four score years ago that past politically-motivated activity was not reasonably related to qualifications for the practice of law, it precluded the decision below.

The decision below is even more clearly seen to be arbitrary and unreasonable when measured against the background of a realistic appraisal of Party membership in the late '30's, the Popular Front period, when all talk of revolution had ceased, and the Party posed—even to its own members—as a model of 20th Century Americanism. Persons joined the Party for idealistic reasons, not knowing of its involvement with espionage and sabotage; the Party kept them busy with slogans and many tasks, thus preventing them from learning the true nature of the Party. When knowledge dawned in the eye of the member, he either left the Party in the light of his new knowledge or advanced to the inner circle of the Party. Schwere left.

Seen against this background, a decision finding Schwere of questionable character because he had been an idealist who both joined the Party and left it because of his ideals shocks the sense of fair play which is the essence of due process. When Schwere is stigmatized as of questionable character because of this, despite his unwavering present opposition to Communism, his offer of aid to the FBI in combating Communism, his devotion to a religion incompatible with Communism, and despite the other overwhelming evidence of his fine moral character, the decision below all the more shocks the conscience.

The Court below added a second factor in disqualifying petitioner, that he had used aliases two decades previously. But in so doing, petitioner had merely been exercising a common law right, especially well-recognized in the states where he had exercised such right. When Schwere used aliases to avoid racial and religious discrimination, no moral onus upon him could have possibly resulted. Nor was any adverse inference to be drawn from Schwere's having used an alias when he was illegally arrested. No court in the land has ever permitted an adverse inference to be drawn from any such legal uses of aliases. The use of aliases, especially in the remote past, is in no way

reasonably related to the qualifications of an attorney. When petitioner, moreover, ceased using alias twenty years previously and determined then that he would never use them again, it is clearly arbitrary for the use of aliases in the remote past to be considered a disqualifying factor today; especially in view of the exemplary life led by petitioner for fifteen years before he sought admission.

Just as Schware is the only person in the United States who has had past use of alias considered adversely to him, so too is he the first person who has ever had mere past arrests considered against him. Even if such *ex parte* accusations made by policemen without hearing could constitutionally be considered as material to the character of the one accused, still there was nothing in the facts surrounding the arrests to make out even a *prima facie* case of any guilt. Even if he had been guilty of any of the offenses for which he was arrested (which he was not), the Court below did not find (and could not have found) any moral turpitude involved. The Court did not consider, moreover, that the conduct of Schware which prompted his arrests had been motivated by his good moral character. But, in any event, the mere fact of arrests—unaccompanied by prosecution or conviction—cannot constitutionally be a substitute for a finding of guilt. Schware nowhere manifested any attitude toward his past arrests which could reasonably be considered as evidencing lack of good moral character. What the Court below did was to unconstitutionally subvert the fundamental presumption of innocence, which attaches even in proceedings for qualifying a member of the Bar.

And, in any event, the Court's conclusive presumption that arrests two decades previously means lack of good moral character today, despite fifteen years of uprighteous and model behavior, violates due process.

The cumulative effect of the standards used by the Court below is cumulative unconstitutionality. Schware stands

condemned as lacking in good moral character today solely because of the opinion of the Court below (rendered with the gift of hindsight) that Schwere used bad political judgment, both in his joining of the Party and his use of aliases and arrests, which occurred because of his living his own idealism and that of the god that failed him. Unless our society wishes to keep communists and former communists as prisoners of the Communist Party, it must open the doors of respectable society to the former communist who lives down his bad political judgment of the past and redeems himself by a decade and a half of virtuous, upright and religious behavior.

II. The Lack of Procedural Due Process

Procedural due process was violated too, for the respondent below considered evidence from undisclosed sources, refusing to disclose either the evidence, a summary thereof, or the names of those persons who gave it. While the respondent indicated that it did not base its decision upon such *ex parte* materials, nowhere is it contended that it was not influenced thereby. Petitioner, moreover, never waived his right to receive the character report or the evidence upon which it was based. The fact that the Court failed to consider the *ex parte* material does not cure the unconstitutional action of the respondent in failing to grant procedural due process, for it gave great weight to respondent's determination. Indeed, it would not have considered the matter in the first place had the respondent reached a favorable determination.

ARGUMENT

Introduction

Though the Court below admitted that Schware "presently enjoys good repute among his teachers, his fellow students and associates and in his 'synagogue'" (R. 125), it completely failed to consider the overwhelming evidence as to his present moral character, casually summing it up in less than one-half of a page of its twenty-five pages of opinions (R. 120); it did not weigh such evidence against what it considered past moral delinquencies; it did not relate what it considered past moral delinquencies to petitioner's present good moral character. It judged the present wholly on the past. By determining Schware's eligibility on the basis of a standard of past moral character, which is wholly inconsistent with the regulatory standard of present moral character, the Court below violated due process. *Cole v. Arkansas*, 333 U. S. 196. True, the Court below did rely on what it termed petitioner's "present attitude towards" certain elements of his past, but there is absolutely no evidence in the record of any attitude toward these elements which at all justifies even the slightest adverse inference (see *infra*, pp. 43, fn. 21; 49-50).

The same conclusion of violation of substantive due process is reached by the several lines of argument below as to each of the factors upon which the Court below relied (Points I-III, V, *infra*).

POINT I

Exclusion from the bar because of innocent membership in the Communist Party in the remote past, conflicts with the due process clause of the Fourteenth Amendment to the United States Constitution, for it shocks the conscience, is arbitrary and unreasonable, bears no reasonable relationship to the qualifications of an attorney, and stifles free speech and association.

A. Such a denial shocks the conscience.

In *Galvan v. Press*, 347 U. S. 522, 530, this Court stated that "much could be said for the view" that deportation "of an alien who is duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought" would "shock the sense of fair play—which is the essence of due process * * *." But Congress' plenary power over aliens, together with legislative difficulties in assessing the bona fides of an alien's severance of Party relations since the Party itself had expelled all of its alien members, caused this Court to uphold the deportation of the alien.²

Rudolph Schware, petitioner here, is not an alien. He is an American. Long before the existence of any legislation indicating possible illegality, he was duped into joining the Communist Party because its members gave lip service to idealistic ends. When in 1940 he learned that its sweet-sounding siren song of slogans was a veil for its nefarious purposes, he left the Party, ceasing all Party activities, and gradually came to a renunciation of all its

² President Eisenhower has asked that the law invoked in that case be restudied because an ouster of former "subversives" may result in an ouster of an alien who has more recently "conducted himself as a model American." Letter to Sen. Watkins, dated April 6, 1953, 90 Cong. Rec. 4321 (1953).

principles.³ He offered his services to the FBI against the Communist movement. He became a devoted member of a religious faith which is completely incompatible with Communism, and intends to bring his children up as religious persons. For the fifteen years prior to his candidacy for the Bar, he lived an exemplary life, earning the high and universal esteem of associates and teachers. He served

Paradoxically and unreasonably, the Court below indicated some doubts as to Schwere's break with Communist principles in 1944, though it did not rest its decision on that ground. In 1944, the Court complained, Schwere wrote an anti-Jim Crow letter to his wife in which he called anti-Communism stupid and dangerous, equating anti-Communism with anti-Semitism and anti-Catholicism (R. 123, 81-2). Precisely what the Court was attempting to prove by this letter is not quite clear; for one thing, Schwere had admitted that his sympathy with some Communist principles had not necessarily ceased upon his termination of his membership four years earlier, that it may have ceased in the very year that he wrote the letter (R. 51-2). In any event, the letter itself shows a picture of a non-Communist who could be considered only as a person of good moral standing. For he rested his view that the antis he mentioned were evil mistakes on the ground (*inter alia*) that "They violate Christian ethics." It is absurd to find that a person who recognizes Christian ethics is sympathetic to Communism. Moreover, no pro-Communist would have ever condemned anti-Catholicism as did Schwere, since anti-Catholicism as well as anti-all-other-religions-views is a prime doctrine of Communism. In 1944, moreover, petitioner was in the U. S. Army, a fighting ally of Soviet Russia. Anti-Communism might under those circumstances have very well been considered close to treason by most loyal Americans. An Orwellian rewriting of history cannot constitutionally be made the basis for depriving a person of the right or privilege of practicing law. The comments of the Court below amount only to distortion of the record and of historical and philosophical fact. In addition, it should be noted that the 1944 letter defines anti-Communism as discrimination against a minority. The attitude that one should not discriminate against Communists, held even now by outstanding Americans, is hardly proof of sympathy with Communism. And discriminations against Communists in 1944 certainly would not have helped to win the war, as Schwere pointed out.

Schwere's hangover of Communist beliefs for a period after his complete break with the Communist Party is typical of the ex-

honorably in the armed forces as a paratrooper instructor. He is well-informed now on the theory and dangers of Communism, and is violently anti-Communist. It shocks the conscience and the sense of fair play when it is held that such a man is not of good moral character.

The methodology of reaching this conclusion is shocking, too. The Court below reads adverse inferences into Schwere's Communist Party membership from 1932 to 1940 because of Mr. Justice Jackson's 1950 characterization of the Party in 1950 (R. 124, *Communications Ass'n v. Douds*, 339 U. S. 382, 424-433), which was based upon a plethora of literature and congressional investigations which had mainly occurred *after* petitioner quit the Party—even though the Court below was itself startled by the contents of Mr. Justice Jackson's opinion (R. 124). The Court below ignored the facts that even in 1943, courts, administrators, legislators and students were "perplexed"

Communist. Ex-Communist Arthur Koestler, speaking of his own "clinging to the last shred of the torn illusion", writes: "The addiction to the Soviet myth is as tenacious and difficult to cure as any other addiction. After the Lost Weekend in Utopia the temptation is strong to have just one last drop, even if watered down and sold under a different label. And there is always a supply of new labels on the Cominform's black market in ideals. They deal in slogans as bootleggers deal in faked spirits; and the more innocent the customer, the more easily he becomes a victim of the ideological hooch sold under the trade-mark of Peace, Democracy, Progress or what you will." ("The God That Failed", edited by Richard Crossman (Bantam Edition, 1951), at p. 74.)

The only scientific study of what makes and unmakes a Communist was recently conducted at Princeton University under the direction of Prof. Gabriel A. Almond, who reports that the process of "ideological disenchantment after leaving the Party" may take years to complete. Almond, "The Appeals of Communism" (1954), p. 352. See, *passim*, *id.* at 351-355.

Note that Mr. Justice Jackson commented that "Most of this information would be of doubtful admissibility or credibility in a judicial proceeding." 339 U. S. at 424, fn. 2. Yet in the judicial proceeding below, the Court below relied completely upon Mr. Justice Jackson's summary of such information.

by the problem of what the Communist Party truly stood for (*Schneiderman v. United States*, 320 U. S. 118, 147-148 and *passim*), that the Supreme Court of the United States in 1943 held that the Government of the United States had failed to prove the existence of any nefarious aims of the Communist Party (*ibid.*),⁵ and indeed that the former Presidential candidate of the Republican Party, Wendell Willkie, had in 1943 defended the member of the Party's National Committee whose naturalization was at stake in that case (*id.* at 119, 127).

The decision below becomes even more shocking when Schwere's Communist Party experience is measured against that of others who have similarly passed through the pearly gates of Communism only to learn that the pearls are alluring disguises for the bitter poison they contain.

⁵Mr. Justice Jackson himself summed up the *Schneiderman* case as follows: "*Schneiderman v. United States*, 320 U. S. 118, overruled earlier holdings that the courts could take judicial notice that the Communist Party does advocate overthrow of the Government by force and violence. This Court reviewed much of the basic Communist literature that is before us now, and held that it was within 'the area of allowable thought', *id.*, 320 U. S. at page 139, that it does not show lack of attachment to the Constitution, and that success of the Communist Party would not necessarily mean the end of representative government. The Court declared further that 'A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open.' *Id.*, 320 U. S. at 157. Moreover, the Court considered that this 'mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon. * * *'; *ibid.*, was within the realm of free speech." *Dennis v. United States*, 341 U. S. 494, 568, fn. 12.

For most of the persons who entered the Party in the early '30's, like Schwere, joined it because of its purported idealistic aims; some were subconsciously influenced, as Schwere doubtless was, by the need to rebel against

"The United States has officially recognized this, even as to present Communists. Says the Department of Defense, in its pamphlet "Know Your Communist Enemy: Who Are Communists and Why?" (8 December 1955, DOD PAM 4-6/DA PAM 21-72/AF 34-10-2), at p. 14: "* * * we have learned that communism attracts most of its followers when they are young. Among the kinds of young people it attracts are: * * * (2) idealists who want a great cause to devote their lives to and who are ignorant of the real nature of communism". The other category of youngster attracted in this country is the neurotic who turns to the Party to give his life direction and meaning: *Ibid.*

Almond, *op. cit.*, *supra*, p. 103, dealing exclusively with former communists, notes that idealism has almost universally been the reason for joining the Party in the past: "Almost all the respondents [subject of the study] perceived the party at the point of joining in terms of one or a combination of its agitational goals, as a means of combating and destroying Fascism, racial, ethnic, and religious discrimination, or imperialism; or positively as a means of attaining trade union objectives, peace, general social improvement, or humanitarian socialist goals. If these findings are an accurate reflection of the general pattern of perception of the movement, then it can be said that the typical party member does not perceive the esoteric properties of the party at the time of joining, but is attracted to one or more of the agitational goals." P. 103. See also pp. 99-126 *passim*.

Ernst & Loth, "Report on the American Communist" (1954), at pp. 183, 184:

"Whatever the combination of psychological factors that led the individual into the party, almost invariably it seemed to that individual that his motives were entirely idealistic. In fact, almost to a man and a woman they began by pointing out that their motives were the betterment of society through fighting war or fascism or discrimination or poverty or some other form of underprivilege and injustice. * * *

"* * * the fact remains that the rank-and-file Communists are idealists. They are selfless and dedicated people * * *. They are quite sincere when they tell us that in the Communist party they seemed to find the most dedicated, if not the wisest or most honest,

parents.⁷ Many joined the Party under the same precipitating impetus as did Schwere, when they found that the Party was an action organization, while other groups with lofty aims were apparently neither activist nor ardent.⁸ Like Schwere, the typical Party member had no knowledge of the espionage activities of some of its members, until the revelation of such activities in the '40's shocked both Communists and non-Communists into awareness.⁹ During their years in the Party, most members, like Schwere, were

fighters against fascism or the noisiest crusaders for racial equality or the most dramatic proponents of justice for sharecroppers or the unemployed. They sincerely confuse demagogic promises for paradise tomorrow with secret plans for totalitarian dictatorship."

See, also, Granville Hicks, "Where We Came Out" (1954) at p. 48. Hicks notes that "Up to a point and in a curious and highly qualified way, I am proud of having been a Communist." *Id.* at 243.

⁷ Almond, *op. cit. supra*, at pp. 104, 264 ff.; Ernst & Loth, *op. cit. supra*, pp. 51-77.

Oddly enough, while 11% of the parents of American Communists were antireligious or indifferent to it, 53% of such parents were pious or observant. Almond, p. 210.

⁸ Almond, *op. cit. supra*, p. 127: "Sixty-nine percent [of ex-Communists studied] voluntarily gave the militance and aggressiveness of the party as one of their reasons for joining it."

Says the Department of Defense, *op. cit. supra*, p. 9; "But the socialist program no longer [during the depression] seemed adequate. To quote Hicks: 'A socialism of deeds, not of words, was what we were looking for, and it was true that the Communists were active in every strike and every unemployment demonstration and that they were being beaten and jailed and sometimes killed. By comparison the Socialists seemed tame and ineffectual.'" Hicks stressed that even Lincoln Steffens wrote that "Nobody in the world proposes anything basic and real except the Communists" (Hicks, *op. cit. supra* at p. 34).

⁹ Hicks, *op. cit. supra*, p. 45: "However, I saw no evidence of espionage or sabotage while I was in the Party." See also p. 95, where Hicks shows he was first enlightened by the Canadian Royal Commission report on the Gouzenko case in Canada. See, also, in 10, *infra*.

kept busy with beautiful words and high-minded tasks, thus preventing them from learning the real truth.¹⁰ Like Schware, disillusionment began for many with the 1939

¹⁰ Says the Department of Defense, *op. cit. supra*, p. 6:

"* * * most members are not indoctrinated in Marxism or in the real aims of the Communist Party before they join it. Immediately after joining, the recruit is drawn into activities. Thus he is made to feel a part of the Party, even though he does not understand its inner workings or its real aims and purposes. Later he is given all kinds of slogans that are supposed to explain communism and his role in the movement. He learns to repeat these slogans. If he uses the right one, he is 'on the beam.' If he uses the wrong one, he is off. Thus most Party members are kept busy with activities and slogans.

"Some members gradually become aware of the real purpose of the Party and accept it. They are then ready to move into the inner Party circle and join the hard core of conspirators. Or, as in the case of many rank-and-file members, they may smell a rat, be repelled by the smell of it, and start on the path of disillusionment that takes them out of the Party. Others may simply become bored and drift away from the Party, as was the case with many U. S. Party members.

Almond, *op. cit. supra* at pp. 297, 298, goes into this in more detail: "But while the new recruit is not a Communist, there is one thing he can do immediately: become involved in 'activities.' And so the second stage of assimilation into the party is the stage of being 'activated.' The recruit is given tasks. Indeed, the pressure on him to undertake tasks is ordinarily so great that he is left with little leisure to appraise his new experiences. In the words of our informant, * * * This is commitment without indoctrination, and only the individual intellect will determine how far he can go on this basis. The devoted party member may be extremely naive politically. * * *

"The third stage, according to our informant, involves 'sloganization.' The CP is ready for our man with slogans. It reduces a policy to manageable proportions for him. All it requires is memory of one or two words, hammered away and repeated endlessly. If you use the right slogan, you're on the line; and if you use the wrong one, you're off * * *. The typical stage of indoctrination is the slogan stage. Most party members don't get any further than this * * *. This explains in large part the ritualistic atmosphere of the party. That is, you say the right things in the right way and you get along. Hence many people become very good Communists without ever having a serious political thought.

"Thus most party members live in a world of 'activities' and 'slogans.' They lack the time, energy, skill, and courage to break

Hitler-Stalin pact,¹¹ and Schware's delay in leaving the Party after disillusionment was typical of the ex-Communist.¹² Many ex-members today give the same reasons as did Schware for leaving the Party.¹³

through this powerful organizational pressure which devours their time and provides them with a rigid and simple intellectual structure. To make progress beyond this point is to 'break through' or 'break away.' To 'break through' means to become privy to the esoteric party and to accept its integral reduction of all goals and values to the power of the party. To 'break away' means that the dawning realization of the character of the esoteric party produces repulsions which ultimately lead to defection." See also pp. 66-93 for an analysis of the Party's different approach in publications directed to the inner circle and those directed to the average Party member.

Hicks notes, too, that "in the later thirties the party did not even try to *** discipline *** all its members." *Op. cit. supra*, p. 66.

The opinion below seemingly draws adverse inferences from the fact that Schware's labor activities were somewhat induced by his Communist beliefs. Says Hicks: "I also believed that the Communists ought to influence and if possible control whatever labor unions they belonged to. (Why not, since the party's policies were, I believed, right?)" *Id.* at p. 45. Note that Schware did not go so far, but instead delivered a union to the AFL.

¹¹ Almond, *op. cit. supra* at 369; Department of Defense, *op. cit. supra* at p. 9.

¹² Almond, *Op. cit. supra*, p. 337. He explains: "Almost two-thirds of the respondents had doubts about remaining in the party for more than a year before the final break (see Table 1). The number of years spent in doubt varies with rank and tenure in the party. Thus 35 per cent of the high-echelon respondents (who also had the longest tenure) were in doubt for three years or more, as compared with 21 per cent for the low-echelon respondents and 17 per cent for the rank and file. At the other extreme, 32 per cent of the rank and filers had doubts for less than one year, as compared with 12 per cent for the high-echelon respondents." See, also, Ernst & Loth, *op. cit. supra*, pp. 14, 212-219. (As to the lack of importance that the particular event causing the break has to the bona fides of the break, the latter note the "contempt which ex-Communists display toward anyone who leaves the party at a later date than they did". *Id.* at 217.) The Defense Department, *op. cit. supra*, p. 6, also notes the "long period of doubt about the aims and practices of the Party" before final disillusionment.

¹³ Almond, *op. cit. supra* at pp. 299-300:

"What is interesting in our findings as to these processes of assimilation into and defection from the Communist movement is

This case presents these questions: whether a person who was duped into joining the Communist Party for high moral reasons, who left it when he became aware of its true nature, is in the first instance to be condemned as having been lacking in moral character; and, whether even if some inference of immorality can be drawn from

that so few of the respondents fully perceived the esoteric party at the point of defection or in their subsequent thinking about their experience. In other words, most of them did not perceive the esoteric party when they joined and were not fully aware of it when they left. To the extent that perception of, and repulsion from, the esoteric party was involved in defection, it typically took the form of a realization that the 'real' party to which they had finally become exposed was different from what it had been represented as being, and that this 'real' party either involved risks and costs which the respondents were unwilling to incur, or was felt to be intrinsically evil in some general way. But it was the rare case who could generalize about the party or explicate this feeling beyond offering such vague characterizations as 'The leaders are all corrupt'; 'They're out to line their pockets'; 'What these boys want is power'; 'They're just Russian puppets'; and the like.

"This finding should not occasion surprise, since clarity in the perception of one's political associations and affiliations is generally rare. What is of importance in this connection is that this is probably as true of most Communists as it is of other groups. This may suggest that the widespread view that all party members are, or that all former party members were, in the same sense participants in the 'conspiracy' is quite inaccurate."

See also *id.* at pp. 305, 306, 308-9, 322: -

"The problem which troubled the consciences of quite a few of our respondents was the party's practice of using people, manipulating them, misrepresenting the party's purposes. Seventeen per cent of the respondents referred to these manipulative practices as factors contributing to their defection. * * *" (305).

"More common among the respondents were reactions against threats to their own individuality. * * *" (306).

"Most individuals when joining the party are not fully aware of the integral loyalty demanded by the movement. They consider that there is an identity of national or trade union interests with that of the party, or at least that the two interests do not conflict. It is quite evident that this exclusive claim upon loyalty is not fully perceived by a large proportion of party members at the time of joining, since so many defections occur at the point at which the party insists

such wasted years, the ex-Communist can never redeem himself by good works and subsequent anti-Communism. The Court below gave affirmative answers. We submit that such answers shock the conscience. The ex-Communist who turns anti-Communist, as did Schwere, can be a particularly valuable ally in the battle against Communism.¹⁴ Our society can afford neither to make him a

that national loyalty, trade union loyalty, or minority group loyalty be subordinated to party loyalty. * * * (308-9).

"Leaving the party thus seems typically to involve not a general appreciation of the character of the party, but a response to specific experiences with certain aspects of it. Often the disillusionment with the party had the same basis as the original 'illusion.' Thus many trade unionists joined the party because they felt there was a coincidence in goals between the party and the union movement, and left the party when they found that it was subordinating the union or unions to its own purposes. * * *

* * * Most of the generalizations offered by the respondents were of a simple order. Thus the party was described as being essentially concerned with power rather than with moral and humanitarian goals. Twenty per cent. of the respondents described it in these terms" (322).

47% of working class members (as was Schwere) left the Party like Schwere because of its conflict with true trade unionism. *Id.* at 326.

¹⁴ Ernst & Loth, *op. cit. supra* at p. 16: —

"The best thing about the Communist party in America is the people who leave it. Not that former party members are heroes. But some have proved that they can be useful citizens, and they represent the best reservoir for an understanding fight against communism that we have. For they are people who know. They know what makes the party tick and what it takes to draw members out of it."

And at pp. 93-4:

"It is at this point that the Communist is redeemable. Our mistake as a nation has been to fail to capitalize on his disillusionment. For in most Communists—in virtually all of the general membership, we believe—there is a strong strain of idealism. Whatever other factors may be involved in their adherence to the party, they are selfless, dedicated people. Furthermore, they have illusions when they join. An idealist with illusions may be almost anything from saint to sinner. It is when he is without illusions but retains his

pariah beyond rehabilitation, nor in this way to deter present Communist Party members from leaving the Party.¹⁵

Many persons have been in and out of the Party, per-

ideals that he becomes the most useful citizen. In reclaiming Communists, the trick is to remove the illusions without impairing the ideals." As Richard Crossman says, speaking of ex-Communists in his Introduction to "The God That Failed", *op. cit. supra* at p. 12, "The Devil once lived in Heaven, and those who have not met him are unlikely to recognize an angel when they see one."

Despite the more publicized literature of extreme right-wing ex-Communists, only 2 per cent of ex-Communists finally turn to the extreme right and another 2 per cent finally become conservative, according to Almond's figures. The majority become liberals. Almond, *op. cit. supra* at p. 357.

¹⁵ The Defense Department, *op. cit. supra*, at p. 6, notes that "the difficulties of starting a new life outside [the Party] keep some in who would leave if they dared."

Almond, *op. cit. supra*, at p. 369: "In the American case, the heavy sanctions imposed on former party members are a factor creating difficulties in defection." And at p. 359:

"* * * In other words, in a society in which there is a large, moderate movement representing the interests of the lower income groups, and where no extreme sanctions are imposed on former members of the Communist Party, the process of defection appears to be constructive. Such individuals are reassimilated into political society with a minimum of loss both to the individuals involved and to the society at large."

Cf. Ernst & Loth at 218-19: "If there is no hope of a job or a place in the non-Communist world, how can a Communist afford to leave the party? He may be certain in his own mind that he has no more sympathy with communism. He may be prepared to make a full disclosure of all that he knows to the FBI. But he may also feel himself trapped by an inability to support himself and his family economically and emotionally outside the fold."

"This fear is strengthened when he sees non-Communists hounded because of a suspicion that they sympathized with or helped the movement. The party card-holder can and often does believe that if liberals who are smeared for mere association with a Communist or a Communist group can be ruined, the former party member will be in a hopeless situation. So the average rank-and-filer usually remains in the party for a good deal longer than he would like to; and a good deal longer than is good for society. * * *

"Nevertheless, it would be a gain for all of us if their term in the party could be shortened. Since they spend about one-fourth

of their period of party membership as prisoners of communism looking for a way out, this could be accomplished if we could create safely a climate in which it would be as painless to give up the party card as it is to drop a magazine subscription. By 'safely' we mean without danger to the security of the nation. At present, disillusionment is not enough to cause an immediate break. An escape needs to be arranged. It still remains to be proved that our society is sufficiently interested in these prisoners to help them get away, and, collaterally, to deter others from joining."

And again at 231:

"The country's record on job discrimination, or perhaps we should say failure to apply proper job discrimination, against former Communists is a sorry one. The one consistently bright spot which we could find is provided by the Roman Catholic Church. Side by side with its strong opposition to communism, the church not only has successfully persuaded a great many Communists to leave the party but has undertaken to help them make new, respectable places for themselves.

"This, of course, is in line with the Catholic doctrine that there is no sin so great that redemption after repentance is impossible. Furthermore, the Catholic Church is opposed to communism as such and is not swayed by fear of losing business or being thought red or being criticized—motives which seem to be as strong in some of the most vocal anti-Communists as any real hatred of communism.

"Where such people spurn the former party member without trying to establish his sincerity or lack of it, the Catholic Church welcomes the former Communist, helps him overcome the loneliness which is the almost inevitable aftermath of escape from the party, steers him into a job if he needs one. If he fears reprisals from party members, the church will even find him a job in another city and help him move there so that he can re-establish himself in an environment where his past is not likely to catch up with him publicly."

At p. 233:

"* * * One of the greatest fears of the disillusioned party member is that he will lose his job and never get another. If he saw employers and fellow workers united to remove that fear, he would not spend one-fourth of his time in the party nerving himself to get out. He could do it when he realized his error. Others might be prevented from joining if a societal attitude were so changed."

At pp. 239-40:

"* * * In a war one does not ask a deserter from the enemy if he is sure he repents sincerely and completely, his term of service with the foe. We are glad to get a reduction in the strength of the oppos-

haps seven hundred thousand.¹⁶ It would take page after page to list merely the luminaries, esteemed persons amongst us, who would all have to be stigmatized as was Schwere below.¹⁷ To so stigmatize is shocking. The only scientific study yet made of what makes and unmakes a Communist is a study recently had at Princeton under the direction of Prof. Gabriel A. Almond, published in 1954 under the title "The Appeals of Communism." A major conclusion of the study sums up succinctly much that we have said (pp. 382-3):

" * * * What we are defending against the nihilistic threat of Communism is the humane and libertarian tradition of the West. There is nothing more precious or more central to this tradition than the attitude toward the individual implied in Christianity and the protections to human dignity in the common law and in the practices of democracy. If we

ing army. Yet present attitudes toward the former Communist are much harsher than toward an enemy deserter. One of the most objective of the former Communists we interviewed, one who seemed happier than most, as well as less bitter, told us he thought it was too bad that Communists were kept in the party because they were afraid. 'a Senator or Congressman needed a headline more than our nation needed a convert from communism to democracy.' He added thoughtfully:

"It would not take much to staff a stampede of present Communists under 25 years of age to the offices of the FBI. All it needs is that the Committees of Congress act as if they really wanted men and women to get out of the party."

"We only wish to add that this also should be the attitude of our whole society * * *"

¹⁶ Department of Defense, *op. cit. supra*, p. 6; Ernst & Loth, *op. cit. supra*, p. 14.

¹⁷ Some former members are on the staffs of Congressional Committees, Ernst & Loth, *op. cit. supra* at p. 218. Those who have been admitted members of the Party include such luminaries as the aforementioned Arthur Koestler, plus Richard Wright, André Gide, Stephen Spender, Ignazio Silone, Louis Budenz, Granville Hicks, Budd Schulberg, Robert Rossen, Elia Kazan, etc.

turn against these, we have literally nothing left save wealth and power; and, left with these, the nightmares of our friends abroad that there may be no choice between West and East will have come close to reality.

"In the number of respects, American policies and actions toward domestic Communism in the last few years represent flagrant violations of this tradition. Treating the former party member as though he could never purge himself of his former associations, or setting up as a condition of becoming purged acceptance of the status of a fully compliant committee witness, is one such violation. Denying the privilege of government employment to former party members, or to persons who have been members of 'front' organizations, is another illustration of a violation of both our legal and religious tradition. To view all party members as equal participants in the Communist conspiracy is to fly in the face of fact. It has generally been the case that only a minority of the party membership is fully aware of the integral power orientation of the party and of its relation to the Soviet Union. The rest of the party are dupes or half dupes. Finally, the penalties imposed for error and self-deception ought not to be the same as the penalties imposed for disloyalty and treason. Our traditions require far greater discrimination in the attribution of guilt and far greater readiness for forgiveness than our actions have reflected."

We demonstrate below that the decision reviewed here violates due process in other ways. We pause to comment that such other violations also demonstrate how the decision of the Court below further shocks the conscience.

B. Such a denial of admission is arbitrary and unreasonable.

The respondent Board had found mere past membership in the Communist Party to be a disqualifying factor. It did not mention whether or not the membership had been "knowing" (R. 91). The Supreme Court of New Mexico,

though it had no evidence whatsoever before it that membership was knowing, yet termed Schware's membership "knowing" (R. 150), despite the uncontroverted evidence before it that Schware had joined the Party through idealistic motives, had heard beautiful words while in the Party, and had left the Party as soon as it became apparent to him that it was an evil force. Such "Indiscriminate classification of innocent with knowing activity must fall as an asertion of arbitrary power" (*Wieman v. Updegraff*, 344 U. S. 183, 191), though it be couched in the disguise of a finding of knowledge, which flies in the face of the uncontroverted evidence in the record. *Norris v. Alabama*, 294 U. S. 587.

The Court, in arriving at its assumption of knowledge, probably fell into the error of assuming every Party member to be part of the Communist conspiracy (see R. 124). There are, of course, many problems which arise because of the dual nature of the Communist Party today, for it is both a political agitational movement (see *Communications Assn. v. Douds*, 339 U. S. 382, 392: "Communists, we may assume, carry on legitimate political activities.") and a part of the Soviet conspiracy. To equate mere Party membership—especially when entered into with the best of intentions—with participation in the conspiratorial aspects of the Party, is to be most arbitrary and unreasonable, is to make the very indiscriminate classification condemned in *Wieman, supra*. It is especially arbitrary and unreasonable in the light of the fact that the average Party member didn't learn of its evil aims until just before he either left or joined its inner circle (see p. 33, and fns. 9, 10, *supra*). As this Court has noted:

"In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. 'They had joined, [but] did not know what it was, they were good, fine young men and women, loyal Americans, but they had been

trapped into it—because one of the great weaknesses of all Americans, whether an adult or a youth, is to join something.” (The quotation is the testimony of J. Edgar Hoover.) *Wieman v. Updegraff*, 344 U. S. 183, 190.

In contemplation of law, indeed, Schwere may be said never to have been even affiliated with the Party. As this Court has said, “ * * * he who cooperates with such an organization only in its *wholly lawful activities* cannot by that fact be said as a matter of law to be affiliated with it.” *Bridges v. Wixon*, 326 U. S. 135, 143. (Emphasis the Court’s.)

But even if it could be said that Schwere had *scienter* in the constitutional sense, nonetheless the Court below acted arbitrarily and unreasonably. This for three reasons:

(1) The Court below failed to take into account the fact that Schwere had severed his relations with the Communist Party when its character became apparent to him. By ignoring the possibility of change in views and affiliations—once a Communist, always condemned—it acted arbitrarily and unreasonably. It was the absence of this violation of due process which helped this Court sustain the loyalty oath in *Garner v. Board of Public Works*, 341 U. S. 716, where the Court said at 723:

“Nor are we impressed by the contention that the oath denies due process because its negation is not limited to affiliations with organizations known to the employee to be in the proscribed class. *We have no reason to suppose that the oath is or will be construed * * * as affecting adversely those persons who during their affiliation with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent * * **” (Emphasis added.)

Mr. Justice Burton, while agreeing that a municipality could exact information from its employees as to past

membership in the Party, construed the oath differently, and therefore dissented in part. His construction of the oath and his resultant constitutional views could have been written for the very case at bar:

"I cannot agree that under our decisions the oath is valid * * *. The oath is so framed as to operate retrospectively as a perpetual bar to those employees who held certain views at any time since a date five years preceding the effective date of the ordinance. It leaves no room for a change of heart. It calls for more than a profession of present loyalty or promise of future attachment. It is not limited in retrospect to any period measured by reasonable relation to the present. In time this ordinance will amount to the requirement of an oath that the affiant has *never* done any of the proscribed acts." *Id.* at 729. (Emphasis Mr. Justice Burton's.)

Accord: *Wieman v. Updegraff*, *supra*; *Barsky v. Board of Regents*, 347 U. S. 442.

42) The Court below, although it noted that the Communist Party and membership therein were perfectly lawful when Schwere was a member (R. 109), nonetheless attached derogatory significance to Schwere's membership, holding that such membership made him "of questionable character" (R. 150). However, in upholding the loyalty oath in *Garner*, this Court noted that it had "no reason to suppose that the oath is or will be construed * * * as affecting adversely * * * those who were affiliated with organizations which at one time or another during the period covered * * * were engaged in proscribed activity but not at the time of affiant's affiliation." 344 U. S. at 723. Here, the requirement of good moral character was used to exclude Schwere from the Bar because of mere membership in an organization concededly not engaged in illegal activities during his period of membership, nor

otherwise then legally deficient.¹⁸ This was violative of due process.

In *Garner, supra*, Mr. Justice Frankfurter construed the loyalty oath therein exacted as excluding

“ * * * from city employment all persons who are not certain that every organization to which they belonged * * * at any time since 1943 has not since that date advocated the overthrow by ‘unlawful means’ of the Government of the United States or of the State of California.

“The vice in this oath is that it is not limited to affiliation with organizations known at the time to have advocated overthrow of government.” 341 U. S. at 726.

A vice in the case at bar is that Schwere's disqualification is based on an affiliation with an organization not known—either then or now—to have had illegal aims or methods at the time of Schwere's membership.

¹⁸ The Court below so conceded (R. 109). See, also, in *supra*. Note too that Schwere's membership in the Party commenced in 1934. It was, notes Koestler (*op. cit. supra* at p. 62), “ * * * the Seventh Congress of the Comintern in 1934, which inaugurated a new policy, a complete negation of the previous one * * *. All revolutionary slogans, references to the class struggle and to the Dictatorship of the Proletariat were in one sweep relegated to the lumber room. They were replaced by a brand new facade, with geranium boxes in the windows, called Popular Front for Peace and Against Fascism. Its doors were wide open to all men of good will—Socialists, Catholics, Conservatives, Nationalists. The notion that we had ever advocated revolution and violence was to be ridiculed as a bogey refuted as a slander spread by reactionary war-mongers. We no longer referred to ourselves as ‘Bolsheviks,’ nor even as Communists—the public use of the word was now rather frowned at in the Party—we were just simple, honest, peace-loving anti-Fascists and defenders of democracy. * * * At last, at last, the working class was united again.” Accord, Hicks, *op. cit. supra*, p. 159.

Hicks notes too that “whatever the Party is up to, it always pretends to be nobly serving some great liberal idea.” (*Id.* at p. 160.)

(3) Further, in assessing the significance of Communist Party membership, the Court below fell into an error condemned by this Court almost 80 years ago. In *Cummings v. Missouri*, 4 Wall. 277, 318, this Court pointed out not only the severity of depriving a person of office or a position of trust because of past conduct, but also that an oath is constitutionally deficient when "it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship." Here, the act of petitioner in joining the Communist Party was prompted not by mere charity, but by the greatest idealism possible under our scheme of government: his devotion to our Bill of Rights. The Court below made no distinction between membership in the Communist Party for such purposes and membership for nefarious purposes. The mere membership in the Communist Party, irrespective of purpose, was enough in the opinion of the Court below to render petitioner of "questionable character."

See, also, as to arbitrariness and unreasonableness, *De Jonge v. Oregon*, 299 U. S. 353; *Communications Assn. v. Douds*, *supra*, at 413-4; *Barsky v. Board of Regents*, 347 U. S. 442, 471 (Mr. Justice Frankfurter, concurring).

C. There is no reasonable relationship between such past membership and present qualification for the Bar.

In *Cummings v. Missouri*, *supra*, and its companion case *Ex Parte Garland*, 4 Wall. 333, this Court carefully considered the question of possible barriers to eligibility for the Bar because of past conduct. Said the Court in *Cummings*:

" * * * It is evident from the nature of the pursuits and professions, of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be

no connection between the fact that Mr. Cummings entered or left the state of Missouri to avoid enrollment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counselor to practice his profession * * *. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of these acts at all appropriate as a condition of allowing the exercise of the professions and pursuits." *Id.* at 319.

If, as the Court held in these cases, there is no reasonable relationship between past draft dodging and qualification for the Bar, how can there be a relationship between Party membership and such qualification? If, as this Court held, past sympathy with revolutionists is not reasonably related to an attorney's qualifications, how can past membership in the Party be reasonably related to qualifications for the Bar? And if, finally, past revolutionary acts are not reasonable cause for exclusion from the Bar, how can mere past Party membership be reasonable cause? (Note that Garland ultimately became Attorney General of the United States. Gellhorn, "Individual Freedom and Governmental Restraints", at p. 134). We submit that even if petitioner had *scienter* of the Party's purposes at the time he was a member thereof, such knowing membership in the remote past would still not bear a reasonable relationship to declaring him ineligible for the legal profession fifteen years later—especially when he has been against the Party and led an exemplary life during those last fifteen years.

So far as we are aware, no court in the land has ever permitted the conclusive drawing of an adverse inference from past Party membership, unrelated to any evidence

of present disloyal tendencies.¹⁹ Consideration of such past membership as being conclusively a disqualifying factor, without considering all the surrounding circumstances, violates due process. *Adler v. Board of Education*, 342 U. S. 485, 495-6, and see *supra*, p. 20.

D. The decision below stifles freedom of speech and association.

Affirmance of the decision below would severely "inhibit individual freedom of movement", would "stifle the flow of democratic expression and controversy at one of its chief sources." *Wieman v. Updegraff*, 344 U. S. at 191. No youth hoping to enter a learned profession could join any but the most orthodox groups or political parties. For if he joins any other group or party, from the best of motives, he risks that someday its idealistic aims will be seen to be camouflage. Even if the group has been tested in Court and not found wanting—as the Communist Party was in *Schneiderman*, *supra*—, even if he leaves when he becomes aware of its evil purposes

¹⁹ But cf. the admission oath in the State of Washington, which requires forswearing of present and past membership in groups having violent overthrow of the Federal Government as their object. This requirement is discussed at 34 J. Am. Jud. Soc'y. 173 (1951). For collections of references as to exclusion of Communists from the Bar, see Rules for Admission to the Bar (West 1953), 20, 39, 102, and "Digest of the Public Record of Communism in the United States", at pp. 420-426 (published by the Fund for the Republic). For a summary of the pro's and con's of excluding communists from the Bar, with extensive references, see Gellhorn, "Individual Freedom and Governmental Restraints" (1956) at pp. 131-138. Gellhorn also notes the prevalency in our society of loyalty tests, estimating that (at least before *Cole v. Young*, 351 U. S. 536) at least 20% of all persons in the United States have been subjected to loyalty tests, plus many of their families (Gellhorn at p. 41). He notes that loyalty tests in various states have been extended to pharmacists, veterinarians, piano tuners, and professional boxers and wrestlers. *Id.* at 129-30.

before his government can prove them, even if he turns against the group and leads an exemplary life for fifteen years thereafter; he cannot enter a learned profession. To so threaten our young people is to do violence to freedom of speech and association. Surely the public has nothing to fear from Mr. Schwere's character today—but it has much to fear from the deterrence of the exercise of First Amendment freedoms by our young people which would necessarily result from an affirmance of the decision below. The freedoms of large numbers of persons would be impeded if the decision below were to stand; the danger to the public from a reversal of the decision below are nil. Thus, even under the restrictive test of corollary effects on First Amendment freedoms by exclusion based on thought and association, enunciated by this Court in *Communications Association v. Douds*, 339 U. S. 382, 397, 400, the decision below must be reversed.²⁰

Mr. Justice Frankfurter has succinctly summed up the deterring effects upon freedom of belief and association of a proscription from government employment for past organizational membership. Said he:

“It is bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by ‘unlawful means’? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be

²⁰ Note, too, that the legislative finding of danger, heavily relied upon by this Court in the *Douds* case (*id.* at 391, 401, 411) is lacking here. Even if the presumption that the legislature knows facts [*Daniel v. Family Security Life Ins. Co.*, 336 U. S. 220; *Hardware Dealers Mutual Fire Insurance Co. v. Glidden*, 284 U. S. 151] could be replaced by a presumption that the judiciary knows of dangers from ex-Communist attorneys, it is significant that the Court below made no finding of any such danger, and indeed had nothing before it on which it could have based such a finding.

permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested in 'joining.'" *Garner v. Board of Public Works, supra*, at 727-8.

The Court below found Schware's membership in the Party an excluding factor, moreover, without anything before it to indicate that the Party at the time of Schware's membership advocated "overthrow of government by unlawful means." It instead attached moral reprehensibility upon membership in the Party because of the Party's nature ten years after Schware's membership. It ignored the fact that Communist affiliation between 1934 and 1940 did not mean what Communist affiliation meant in 1950 or 1954. Cf. *Watkins v. United States*, 233 F. 2d 681, 691 (dissenting opinion).

"The needs of security do not require such curbs on what may well be innocuous feelings and associations. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service." Mr. Justice Frankfurter in *Garner, supra*, at 728.

It should also be noted that while there may be certain restrictions upon speech and association of public employees (*United Public Workers v. Mitchell*, 330 U. S. 75), no Court has ever suggested the permissibility of the extension of such non-discriminatory restrictions to embryo attorneys. To permit such inroads would be to restrict the political expression and association of those very persons whose views may be most important to the community. In any event, to deny a person admission to the bar because

of concededly legal membership in what was then a concededly legal political party, because of a feeling that such association was in some vague way immoral (despite undisputed evidence to the contrary) is for the Court below not merely to prescribe what *shall* be orthodox in politics (condemned by this Court in *Board of Education v. Barnette*, 319 U. S. 624, 642) but to make a retroactive judgment with the gift of unenlightened hindsight on what *could have* been orthodox in politics. The threats to freedom of speech and association from *post-hoc* judicial determinations of what was at one time moral and immoral in political doctrine, especially when based on facts existing at later times, is too obvious to be labored here.

POINT II

Exclusion from the Bar because of exercise in the remote past of the ancient common law right to use an alias violates the due process of law required by the Fourteenth Amendment to the United States Constitution.

The second factor relied upon by the Supreme Court of New Mexico in denying petitioner the right to take the Bar examination was the fact that he had used aliases nineteen years previously.²¹

²¹ The Court below did indicate that it relied in part upon what it termed petitioner's "present attitude towards" use of aliases (R. 150). Just what the Court meant is somewhat puzzling, inasmuch as there is nothing in the record whatsoever to show the petitioner presently condones the use of aliases. On the contrary, he has refrained from using aliases for nineteen years, and has stated in this proceeding that he would never use them again. Certainly this Court's jurisdiction cannot be defeated by the Court below attempting to dispose of the case on the basis of supposed facts nowhere contained in the record. *Norris v. Alabama*, 294 U. S. 587, 590.

The right to use a name other than one's given name is an ancient common law right. It was exercised by petitioner in the states of California and New York. California has long recognized this right and indeed has enacted statutes in affirmation thereof. *In re Ross*, 8 Cal. 2d 608, 67 P. 2d 94; *In re Useldinger*, 35 Cal. App. 2d 723, 96 P. 2d 958. New York, in recognizing this right, has ruled that the use of alias cannot be a bar to a person becoming a policeman (*Haynes v. Brennan*, 135 N. Y. S. 2d 900 (Sup. Ct., N. Y., 1954)—not officially reported), and has further ruled that even an attorney who knowingly permits a witness to testify under an assumed name without wrongful motive is not guilty of professional misconduct. *Matter of Zanger*, 266 N. Y. 165, 194 N. E. 72 (1935). Indeed, New York reports show that even Governor Alfred E. Smith once instructed a city employee to work under an assumed name, and the New York courts refused to discharge the city employee. *Lana v. Brennan*, 124 N. Y. S. 2d 136 (Sup. Ct., N. Y., 1953—not officially reported). Said the Court:

"The petitioner, under well-settled legal principles, had a right to change his name and assume a name other than that given to him at birth. In the absence of restrictive legislation, a man may lawfully change his name *at will* without proceedings of any sort. . . . "In assuming the name of 'Joseph Porgie' . . . , the petitioner joined such illustrious company as Presidents Cleveland, Grant and Wilson, and also Mark Twain, Artemus Ward, John Roland, Napoleon Bonaparte and the Duke of Wellington, to cite but a few of the stalwarts who voluntarily changed names, given or surname or both." 124 N. Y. S. 2d at 137-8. (Emphasis supplied.)

It is also significant that despite the vast amount of federal and state legislation aimed at the Communist Party and its members, no law inhibits the use of aliases by communists, though their frequent use of aliases is well known. It must be remembered that Schwere was in a

Communist atmosphere when he used aliases, and doubtless saw no evil because of the prevalence of aliases amongst fellow Party members.

Motion picture, stage, radio and television stars constantly assume aliases, and frequently change them from time to time. Rare is the star who has not changed a name which is easily identifiable as that of a member of a minority religious or ethnic group. Schwere did no more when he changed his name to avoid discrimination by employers and to make his organizing activities more palatable to employees. Neither Schwere nor stars of the entertainment world are to be condemned as somehow lacking in good moral character; it is our society which is at fault, not they. (We may also note parenthetically that if advocacy or practice of discrimination were to be a disqualifying factor for admission to the Bar, many United States Senators as well as many ordinary attorneys would be ineligible for admission. However, such persons are freely admitted to the Bar, while Schwere, the victim of discriminators, is found to be lacking in moral character because he resorted to perfectly legal and ethical means of combating them.) Nor has any Court ever permitted an adverse inference to be drawn from the use of an alias, except in cases where the use of the alias was part of a flight from justice. See cases collected in 2 Wigmore on Evidence, § 276 (1940), and 1955 Supp. thereto, esp. at p. 24.

Surely, for the Court in New Mexico to deny permission to take the Bar examination because of the exercise of a common law right clearly recognized by the states in which it was exercised, attaches an arbitrary and unreasonable requirement to the qualifications for the practice of law. There is no rational relation between the petitioner's legal use of aliases and his character as a potential member of the Bar; certainly, the use of aliases nineteen years previously shows nothing about the character of a man today, especially when he has long since repudiated such use.

Moreover, when the aliases were used in order to avoid racial and religious discrimination, and to gain employment and organize unions, it shocks the conscience to find that the person who must resort to the use of aliases to avoid the consequences of action of others, which violates the spirit of the United States Constitution, is to be so penalized. Failure to consider the motives and purposes of Schware in using aliases also violates due process. See *supra*, p. 38.

The giving of an assumed name to the police twenty-one years previously similarly bears no rational relationship to Schware's moral character today. The police had him in custody, so they could not have been materially misled. His act was concededly legal. The sole purpose of using the alias was to avoid retribution by his employer for arrests which the state impliedly conceded was in error when it failed even to arraign him. Surely this showed no moral turpitude on the part of Schware at the time. Giving a wrong name to the police, even when stemming from less worthy motives, is generally condoned by the public, as shown in the forthcoming movie "Three Brave Men". (The three brave men of the title are a government employee who had given a false name to the police after being arrested in a brawl, his attorney who thinks the matter not significant enough to mention in a forthcoming security risk hearing, and the Assistant Secretary of the Navy who restores the employee to the federal service midst a panoply of publicity.) The use of an alias for the police, while hardly an American past-time, is not generally considered as showing any moral delinquency. Even if such an inference could have been drawn when the alias was used, it is palpably absurd to draw an inference of moral delinquency today from such an act committed twenty-one years previously.

POINT III

Exclusion from the Bar because of arrests in the remote past, without prosecution, trial, or arraignment, violates due process of law.

A. The Law.

Your petitioner had the unfortunate experience of being erroneously arrested four times. The Court below ruled that an arrest *per se*, even without arraignment, prosecution, trial or conviction, or other determination of guilt, is a factor in barring admission to the Bar.

The question presented by such ruling has not previously been determined by this Court. This Court has indicated that a State may constitutionally make the absence of a conviction a condition of admission to a learned profession (see *Barsky v. Board of Regents*, 347 U. S. 442, 451), though it expressed doubts as to whether automatic expulsion from a profession solely because of a conviction is constitutionally valid. *Id.* at 452.

Perhaps the reason that this Court has never been called upon to decide the precise question at issue is because no Court heretofore has ever considered a mere arrest as being sufficient derogatory information upon which to predicate the denial of a privilege or right. Even an indictment cannot be used as evidence against the person indicted. *In Re Oliver*, 333 U. S. 257, 265. An arrest cannot be used, within a criminal or civil court, to impeach a witness. 3 Wigmore on Evidence, § 980a (1940, 1955 Supp.). It is arbitrary and unreasonable to deny admission to the bar because of arrests. For an arrest is nothing more than an accusation by a police officer. It would seem fundamental to our American way of life to rule that no person can be denied a privilege merely because of an *ex parte* accusation. *Shachtman v. Dulles*, 225 F. 2d 938 (C. A. D. C. 1955). This flows from this Court's decision

in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, wherein a majority of this Court held that the United States Attorney General could not legally list an organization as subversive and even collaterally thus deprive it of privileges without a hearing. Four members of this Court squarely held that for the Attorney General to do so is a violation of due process. *A fortiori*, policemen should not be allowed to deprive a person of a privilege merely by arrest when that person is never prosecuted or convicted. To permit a policeman to do so is to permit him to act *ex parte* as prosecutor, judge and jury. Cf. *In Re Oliver*, 333 U. S. 257. Any other rule would leave the way open to clear abuse. Should the decision below be allowed to stand, any person could be barred from the practice of law merely because he had erroneously or maliciously been arrested by a police officer. Cf. *Lyons v. State*, 32 Ala. App. 44, 21 So. 2d 339, 340. To permit an arrest to be considered as derogatory information is to violate due process, to pervert the fundamental American theory of justice, which is that a man is innocent until he is proven guilty, after trial by due process of law. *Cummings v. Missouri*, 4 Wall. at 328.²² If police officers, by virtue of the decision below, can be the arbiters of a person's privilege to practice law, then we have indeed reached a black day in our constitutional history.

We do not deny that, even in the absence of arraignment, prosecution, trial or conviction, the Court below might have properly considered the past acts causing the arrests insofar as they were relevant to present moral character. However, the arrests *per se* were unconstitutionally considered

²² Note, too, that even though an applicant bears the burden of proof, once charges of a criminal nature are involved, it is "fundamental and unchangeable" that he must be held innocent until proven guilty. *Cummings v. Missouri*, 4 Wall., at 328. In any event, the burden of proof must shift from the applicant after he makes out a *prima facie* case of present good moral character, as Schwere did by overwhelming proof. See *Coleman v. Watts*, — Fla. —, So. 2d 650.

a disqualifying factor, as was the use of aliases, without any finding that the acts causing the arrests in any way, showed moral turpitude, and without considering whether they showed any lack of moral character today. Cf. *Barsky v. Board of Regents*, 347 U. S. 442, 451-2. Nonetheless, we present now a discussion of the facts surrounding the arrests.

B. The Arrests.

1. THE ARRESTS ON SUSPICION OF CRIMINAL SYNDICALISM DURING THE MARITIME STRIKE IN CALIFORNIA.

The respondent, upon being advised that these arrests were "in the course of a strike" upon the charge of "commission of an act in which somebody attempts to overthrow or subvert the state government" (R. 22-3), made no attempt at all to question Schware's statement that the arrest was the result of labor activities; as the record shows, the mere fact that he had been arrested was enough to find ineligibility. The fact that Schware was never arraigned or tried on the charges, that they were dismissed, that he was held illegally on these charges—no significance was attached to these facts whatsoever. Nor was any significance attached to the fact that Schware's was but one of 2,000-3,000 arrests during that strike, 200 of whom were charged with criminal syndicalism. As the Yale Law Journal recently commented in regard to the case at bar:

"* * * in an era of turbulent labor relations, detentions followed by release without arraignment during a strike in which several thousand persons were similarly arrested can scarcely be taken as evidence of unfitness to practice as an attorney twenty years later." Note, "Good Moral Character" As a Prerequisite to Admission to the Bar: Inferences to Be Drawn From Past Acts and Prior Membership in the Communist Party, 65 Yale L. J. 873, 881 (1956) (cited hereinafter as "Note").

The Note goes on to point out that there was subsequent Congressional criticism of the arrests. *Ibid.*, fn. 46.

Paradoxically enough, the Court below held that Schwere's explaining this to the Board indicated an evil present attitude towards his record of arrests, stating that he thus "*excuses* his arrests" (R. 125, emphasis supplied). To convert a perfectly reasonable explication of the facts surrounding an arrest into an excuse for an arrest, and to then rule that this evidences a bad present attitude toward the arrest is to flaunt the record as well as to do violence to reason. It is to be arbitrary and unreasonable.

2. THE ARREST FOR VIOLATION OF THE NEUTRALITY ACT.

It is undisputed that Schwere's recruiting for persons to fight Franco, Hitler and Mussolini was openly conducted, in ignorance of the fact that he might be violating the law. It is undisputed that Schwere's case was nolle prossed. This arrest, says the Court, demonstrates some lack of moral character.

If (as we showed *supra*, p. 39) past draft dodging is not a reasonable basis for denying admission to the Bar, still less could a violation of the Neutrality Act constitute such a basis. There being no evil intent necessary to finding a violation of the Act, no moral turpitude is involved in its violation. *Sinclair v. United States*, 279 U. S. 263, 299. Hence, even a violation of this law *per se* imports no lack of good moral character at that time, much less twenty years later.

We believe that petitioner's acts in mere recruiting did not constitute the "hiring or retaining" of persons to serve abroad forbidden by the Act. When Congress wanted to stop recruiting, it used the right word—for in 18 U. S. C. § 2389 it made a criminal of "Whoever *recruits* soldiers or sailors . . . to engage in armed hostility against the [United States]." It has never made criminal recruiting for other purposes. See, also, Mr. Justice Kiker's analysis at R. 131-2, 154-9. In any event, there is no judicial deci-

sion on the precise question; apparently no one has ever been convicted for acts like Schware's. At the worst, it can be said that whether Schware violated the Act is extremely doubtful.

In any event, Schware's acts in recruiting were hardly immoral. While Catholic groups supported Franco's rebels, Protestant and Jewish groups and American educators supported the Loyalists (Note, 65 Yale L. J., at 882, fn. 54). If Schware is to be condemned as immoral, so must those who recruited for the Flying Tigers and for other countries engaged in hostilities during World War II, yet no such persons have ever been prosecuted. (*Ibid.*, fn. 53.) No person has ever been denied naturalization because of violation of the Neutrality Act. (*Ibid.*, fn. 51.)

The Yale Law Journal, after summing up the facts, makes this cogent comment at p. 882:

" * * * To hold that these facts constitute evidence of unfitness to practice law in 1955 appears to extend the 'good moral character' requirement beyond reason or logic, and to judge Schware on his political beliefs rather than his actions. For Schware's actions were not legally distinguishable from those of many Americans who, a short time later, joined, and urged others to join, British and Canadian forces. Differentiating today between the moral character of those who in 1939-1940 were willing to fight Hitler and those who were willing to fight Franco seems possible only on the basis of subjective political opinion. And employment of such criteria to ascertain fitness for the practice of law unwarrantedly places an applicant at the mercy of the political notions of a bar examiner."

In its reliance on what it termed Schware's "present attitude towards" his record of arrests, the only specification it made beside the one noted *supra*, p. 50, was that "With respect to the arrest in Detroit, for activity in violation of a federal statute, we take it that he regards his work in obtaining recruits for a foreign war as even

commendable because he had concluded which side was right" (R. 125). There is not a word in the record of this case to support the Court's remark. It is sheer conjecture on its part. And even were Schwere now proud of what he had done, if he felt that he properly recruited for a foreign power to fight what he believed to be a Fascist revolt against it, supported by Hitler and Mussolini, in ignorance of a law possibly forbidding such recruiting—is this at all relevant to good moral character? If it is, it shows only good moral character. But we believe that political subjective judgments of this sort cannot be constitutionally made.

3. THE TEXAS ARREST RE THE AUTOMOBILE.

Petitioner here showed beyond peradventure that his arrest was so illegal that it could have been the basis for an action for false imprisonment. For despite the fact that he had papers showing his right to possession of the car, the police refused him permission to contact the owner of the car, keeping him in jail two or three days.

Clearly petitioner was guilty of no legal or moral delinquency in Texas. Yet his arrest, the Court below holds, is also a factor in denying admission. Such a ruling is so arbitrary and unreasonable as to verge on the fantastic.

In sum, then, the facts surrounding the arrests show that no moral turpitude was in any way involved in any of them. How, then, can the facts out of which the arrests grew be in any way reasonably related to Schwere's moral character at the times thereof, much less twenty years later? We say that they cannot be reasonably related, and that due process was violated below. Nor is there any present attitude of Schwere towards his record of arrests which can in any way be considered as reasonably related to his good moral character.

POINT IV

The failure of respondent to disclose confidential information, its nature (including the identity of adverse informants) or a summary of such information, received by respondent in the course of its determination of Schwere's good moral character violates the due process clause of the Fourteenth Amendment of the United States Constitution.

Within recent years, the question of the right to know the confidential information received and used against a person in administrative proceedings has been twice exhaustively briefed and argued before this Court. *Bailey v. Richardson*, 341 U. S. 918; *Peters v. Hobby*, 349 U. S. 331. We believe that we can add nothing to the exhaustive treatment of these issues in the briefs of petitioners in those cases and we do not wish to burden the Court with a mere repetition of such arguments. We therefore here incorporate them by reference.

We also point out that there are major differences between this case and the *Bailey* and *Peters* cases. 1) In those cases the secrecy of the confidential information was justified by the respondent on the basis of the interest of national security, the claim being made that to reveal sources of confidential information would dry up the sources of information upon which the FBI relied. But in the case at bar, there is no problem of the national security, nor is there any problem of the drying up of sources, since the possibility of the same source of confidential information being used in more than one bar admission case is exceedingly remote. 2) Moreover, the second major justification presented for non-disclosure in *Bailey* and *Peters* was that a government employee could be discharged at will and therefore had no right to the protections of due process. But an attorney is not in the same category. *Ex parte*

Garland, 4 Wall. 333, 378. A person who applies for a license does have a right to know the information against him, to know names of accusers, and to cross-examine them, even when considerations of national security militate against such rights. *Parker v. Lester*, 227 F. 2d 708 (C. A. 9, 1955). When no such consideration are present, as here, the normal rules of administrative due process apply, and the applicant is entitled to such rights. *Coleman v. Watts*, — Fla. —, 81 So. 2d 650; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 93; *Morgan v. United States*, 304 U. S. 1, 18; *Kirby v. United States*, 174 U. S. 47, 55, 61; *Motes v. United States*, 178 U. S. 458, 467, 471; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 87, 89; *United States v. Abelen & S. Ry. Co.*, 265 U. S. 274, 286, 291; *Southern Railway Company v. Virginia ex rel. Shirley*, 290 U. S. 190.

An attempt has been made to justify the action of the Court below on two grounds. The first ground is that the petitioner waived whatever right he may have had to examine the derogatory information against him by virtue of his consenting to a character investigation. However, he merely admitted in his application for a character report his understanding that "I will not receive and am not entitled to a copy of the report nor to know its contents" (R. 105). (Emphasis supplied.) He at no time waived any rights he might have had to learn the names of the witnesses who may have given adverse reports against him and to have access to all records which were used by the Committee as a basis for rejecting his application other than possibly the report itself. (Even as to the report itself, however, while he did admit his understanding that he was not entitled to a copy thereof, he did not waive his right to examine a copy of the report, should his understanding have been in error. And we claim here that such understanding was in error, that he was constitutionally entitled to a copy of the report which contained adverse

information.) Even if it be held that the language in some way amounted to a waiver, a waiver to be a waiver must be voluntary, and it can hardly be said that a statement of this sort which one is required to sign before he can apply for admission to the Bar in any way is voluntary. For if he didn't sign it, it is manifest that he would never have even been considered. Moreover, to require the waiving of a constitutional right before one can apply for membership to the Bar is itself a violation of due process.

The Court below argued that since it considered the proceeding before it as a proceeding *de novo* and since the only member of the Court who did examine the secret derogatory information was the dissenting Justice, petitioner was not prejudiced by the denial of his right. However, it must be noted that the Court below did lend a great weight to the decision of the Board of Bar Examiners (R. 125), so that whatever the influence the adverse information may have had upon the members of the Board of Bar Examiners may well have been reflected in the Supreme Court decision. Moreover, one can hardly be assured that the secret information was not considered by the Board of Bar Examiners (without whose adverse action this case would never have arisen). While the Board of Bar Examiners did state that "The bases of the decision of the respondent in the petitioner's case here sought to be reviewed are not to be found in such confidential information" (R. 92), it nowhere claimed that it was in no way influenced by the secret derogatory information. Indeed, we would suggest that despite any self-serving denials behind which it is impossible to probe, the allegations of the respondent even if completely true may not represent a true picture, for there may have been an emotional prejudicing effect of such derogatory information, conscious and/or subconscious. "One has to remember that when one's interest is keenly excited evidence gathers from all

sides around the magnetic point * * *." Mr. Justice Holmes in a letter to Arthur Garfield Hays in 1928, set forth in *Joint Anti Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 171. Thus, it was extremely difficult if not psychologically impossible for respondent to have separated in its thinking the evidence from undisclosed sources from the evidence revealed by petitioner himself. It may well have tipped the balance.

In its brief in opposition to petition for writ of certiorari, respondent herein asserted (p. 24) that withholding of confidential information is justified where an administrative agency fails to rely upon such evidence, citing *Barsky v. Bd. of Regents*, 347 U. S. 442, as its authority. However, in that case, the right to cross-examine witnesses and to examine evidence was preserved in the relevant statute (*Id.* at 453). The question was whether known irrelevant evidence as to which the petitioner *had* an opportunity to cross-examine may have unfairly prejudiced the Board against him. We submit that though it is within the competency of an administrative agency to admit evidence which, though irrelevant and possibly with a constitutional taint, is not considered in its determinations, an agency may *not* listen to anonymous and undisclosed evidence, declining to permit disclosure and cross-examination, and later merely make a self-serving declaration that this evidence was not considered, without disclosing to petitioner or the reviewing authorities precisely what that evidence consisted of and without giving him any opportunity to meet it. For no way to determine the truth then exists.

POINT V

The three factors upon which the Court below relied when taken together cannot make constitutional that which is unconstitutional when each is considered separately.

It may be argued that even though one or more of the criteria used by the Court below is repugnant to due process, nonetheless, the Court below did have the right to rely upon the three factors in combination, that by some mysterious process of alchemy, the unconstitutional has been turned into the constitutional by virtue of there being three unconstitutional standards used instead of one. But we believe that the use of three unconstitutional tests cannot make the use of the three tests together constitutional. If this Court believes that one or more of the factors considered did not comport with constitutional standards, then Schwere is clearly entitled to a hearing whose outcome should be determined solely on the basis of constitutional standards. *Stromberg v. California*, 283 U. S. 359, 368; *Williams v. North Carolina*, 317 U. S. 287, 292. In any event, there is no cumulative effect of the three standards used by the Court and Schwere's conduct in relation thereto—except that of cumulative unconstitutionality—for none of the things for which Schwere was condemned bore any reasonable relationship to his qualifications to practice law. Cumulatively they could not have possessed any greater significance.

We note, too, that if perchance this Court should find that certain uses of aliases and/or certain arrests could be constitutionally considered, nonetheless Schwere should be entitled to a hearing free of the taint of those matters which were unconstitutionally considered.

We also suggest to the Court that it need not reach the questions presented by the past arrests, the use of aliases,

and failure to disclose derogatory information, if it determines that petitioner's Party membership could not have been constitutionally considered by the Court below. We say this for the reason that the Board below originally agreed to permit Schware to take the bar examination when it had before it the record of arrests and of aliases, which he had presented to the Board in his application for a character report. It was only after they received the derogatory information against him that they determined that he was ineligible. Since the Board has stated that it acted on no information except facts disclosed by petitioner, it is obvious that the Board below would not have denied Schware permission to take the Bar examination merely because of his use of aliases and record of arrests. We trust that counsel for the Board will admit the accuracy of this statement, which we submit would make unnecessary a decision on Points II, III and IV above.²³

Summary

Petitioner presented overwhelming evidence of present good moral character, probably as much or more than any person applying for admission to the Bar could ever hope to present. The Court below, in determining whether peti-

²³ We now mention additional matters which would more appropriately be mentioned in a reply brief, since there will probably be no time in which to file a reply brief. We note that respondent asserted in its brief in opposition to the petition for writ of certiorari that the petitioner allegedly had not accounted for his residence or employment at certain periods (Brief, p. 22). However, the Court below in explaining the basis for its decision was careful not to rely on these factors, probably because the Board itself had admitted in its answer (R. 90, 91) that it at no time contended that the information Schware disclosed in these connections was anything but whole, complete, and accurate, and no hearing was ever had on this question. Hence, the question of Schware's inability to recall all the various employments and addresses he had when he was touring the country in his desperate search for work are of no significance whatsoever in this Court's consideration of the case.

tioner possessed good moral character, looked only to his far distant past, without relating it at all to his present character. In so doing, it considered evidence of several sorts, none of which has any reasonable relationship to either good moral character or to any other requirement that could reasonably be set forth for admission to the Bar. In so doing, moreover, the Court gave great weight to a decision handed down by men who had examined information never disclosed to petitioner. By all these things, it violated due process.

Perhaps most importantly, by making membership in the remote past in an organization not then illegal a criterion for determining eligibility for the Bar, and by making other political judgments, the Court below has severely restricted freedom of speech and association, especially of all young would-be aspirants to the learned professions, without any remotely compensating gain to the welfare of the state.

The decision below violates due process, including the right to freedom of speech and association, and must be reversed.

CONCLUSION

This Court should reverse the judgment below, and order that Schwabe be permitted to take the Bar examination in the State of New Mexico.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1955.

RUDOLPH SCHWARE,

Petitioner

vs.

BOARD OF BAR EXAMINERS of the
STATE OF NEW MEXICO,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

The respondent has no objection to the portions of the Petition entitled Opinions Below and Jurisdiction (Pet. pp. 2, 3). The respondent is dissatisfied with petitioner's statements required by Rule 40 (c) (d) and (e) and believe that these are more completely and accurately stated as follows.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

- (a) *Constitution Provision* - U. S. Const. Amend. XIV, Section 1, Clause 2: ". . . ; nor shall any State deprive any person of . . . property, without due process of law."

(b) *Statutory Provisions* - N. M. S. (1953 Comp.) § 18-1-8: "With the advice and approval of the Supreme Court, the board [of commissioners of the state bar] shall have power to constitute and appoint five (5) members of the state bar as a special committee to examine candidates for admission to the bar as to their qualifications, and to recommend such as fulfill the same to the Supreme Court for admission to practice under this act. The approval of the Supreme Court of such recommendations shall entitle such applicants to be enrolled as members of the state bar and to practice law, upon taking oath to support the Constitution and the laws of the United States and the State of New Mexico. Such special committee shall be known as the state board of bar examiners" (Adopted as N. M. Sess. L. 1925, c. 100, § 7, amended N. M. Sess. L. 1949, c. 22, § 1. Now found in N. M. S. (1953) Comp.) Vol. 4, pp 84-85).

(c) *Regulatory Provisions*—(Reference is to Rules Governing Admission to the Bar of the State of New Mexico, now found in N. M. S. (1953 Comp.) Vol. 4 pp 85-89).

RULE 1. Qualifications: "(1) An applicant for admission to the Bar either upon examination or certification and motion must be a citizen of the United States, an actual bonafide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character"

2
RULE III. Examinations: "(7) . . . Provided that the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character."

QUESTIONS PRESENTED FOR REVIEW

1. Is there a substantial Federal question of denial of due process presented by the New Mexico Supreme Court's adherence to the finding of its Board of Bar Examiners that the petitioner "has failed to satisfy the Board as to requisite moral character for admission to the Bar of New Mexico," which finding was made upon petitioner's application for admission to the bar and evidence introduced by the petitioner which showed:

- (a) recommendations as to good character by the applicant's classmates, teachers and clergyman,
- (b) history of membership and active and knowing participation in the work of the Communist party admittedly from 1932 to 1940 at applicant's ages of 18 to 26,
- (c) repeated use of two different aliases during the period of his Communist Party activity,
- (d) arrests, without convictions, on an unascertained number of occasions,
- (e) discrepancies and omissions in the petitioner's application and testimony?

2. Is there a substantial Federal question of denial of due process presented by the New Mexico Supreme Court's adherence to the finding of its Board of Bar examiners that the petitioner "has failed to satisfy the Board as to requisite

moral character for admission to the Bar of New Mexico" where the Board had obtained confidential information concerning petitioner, the nature of which was not disclosed to the petitioner, but where *on the other hand*, this confidential information (1) was, according to the sworn pleading of the Board, *not* a basis of its decision, and (2) was not even looked at by those members of the New Mexico Supreme Court who joined in the decision here to be reviewed?

STATEMENT OF THE CASE

The respondent Board has the function of examining "candidates for admission to the bar [of New Mexico] as to their qualifications and to recommend such as fulfill the same to the Supreme Court for admission to practice" (N. M. S. (1953 Comp.) § 18-1-8). Qualifications include United States citizenship, certain educational and residence requirements, a bar examination or admission on motion of attorneys licensed in other states meeting established requirements (See Rules governing Admission to the , printed at N. M. S. (1953 Comp.), Vol. 4, pp. 85-89, and a "good moral character" (*ibid.* Rule I(1)). The respondent Board is authorized to decline to permit an applicant to take the bar examination "*when not satisfied of his good moral character.*" (*ibid.* Rule III(7)).

In December 1953, the petitioner applied for leave to take the examination on February 22, 1954. (Rec. p. 2). His application forms a part of the record here. Pursuant to notice, he presented himself for examination and was interviewed by the respondent Board. (R. p. 2) No transcript was kept of this interview but, at its close, the Board told the petitioner that he would not be permitted to take the examination and unanimously adopted a motion to the effect that the petitioner had failed to satisfy the Board as to his good moral character. (Pet. p. 1a) Subsequently, peti-

tioner obtained counsel who asked for a hearing which was held by the Board at Albuquerque on July 16, 1954.

A transcript of this latter meeting was made and this, together with petitioner's application documents, and the letters received in evidence at the meeting, comprises all of the evidence in this cause. (R. pp. 16-109) At the close of this meeting, the Board unanimously affirmed its resolution of February 22, 1954. (R. pp. 4-5)

It should be noted that it is the practice of the respondent Board to make written inquiries concerning applicants for admission to the bar and these inquiries are made by the respondent and answered by informants upon the express understanding that such information shall be held in strict confidence. (R. pp. 112-113) This procedure is expressly consented to by all applicants for admission and was so consented to by the petitioner. (R. p. 112) The information so obtained in the case of the respondent has never been disclosed to him but was not a basis for the Board's decision. (R. p. 113) The only bases for decision are to be found in the information contained in the application and in the transcript of the July 16, 1954 hearing (sworn Response to Petition and Order to Show Cause, First Defense, par. 10.). (R. pp. 112-113) Upon review of the Board's decision the four members of the Supreme Court of New Mexico who joined in its opinion did not look at this confidential information, although Judge Kiker, who dissented, did so. (Pet. p. 6a)

A narrative statement of the evidence is as follows: The petitioner was born in January 1914 and at the date of his application was 39 years of age. (App. Qu. 4) His father was a needles trade worker, a poor man. (R. p. 22) His father was an immigrant and along with most of his neighbors, a socialist. (R. p. 23) The petitioner grew up in this

environment. (R. p. 24) He began to work at nine years of age and continued to work part time while at school. (R. p. 25) He attended DeWitt Clinton High School in the Bronx, New York, from 1928 to 1932. (App. Qu. 5) While there, in 1932 he joined the Young Communist League after an occurrence in which the Communist students had impressed him in refusing to disband a club upon the demand of the school principal. (R. pp. 25-26) In connection with this occurrence, the applicant was suspended from school for approximately three days. (App. Qu. 16)

The petitioner joined the Communist Party in 1934 at the age of 20. (R. p. 26) In September to November 1933 he was employed in a pocketbook factory in Gloversville, New York. (App. Qu. 1, 3, 7) For the first time he used an alias, adopting the name of Rudolph de Caprio. (R. pp. 17-18) In his written application, he stated that he did so because he desired to organize the employees, most of whom were Italian, into a union. (App. Qu. 16) At the hearing in July 1954, he stated that he adopted an Italian name solely to gain employment. (R. p. 28) From February 1934 to February 1937 petitioner lived in Los Angeles, San Pedro, San Francisco and Berkeley, California, where he was a shipyard worker, longshoreman, warehouseman, and seaman. (App. Qu. 3) During this period he used the name Rudolph de Caprio. (App. Qu. 1b) This was, he testified, solely to obtain employment. (R. p. 28)

In the Communist Party the applicant used the names Rudy de Caprio or Joe Fiori, he does not recall which. (R. p. 52) In 1934 he was arrested "on several occasions" during the maritime strike. (App. Qu. 17b) He was booked under the name Joe Fiori (or Fliari), the name being assumed just to give to the police. (R. pp. 30-31) He derived no monetary benefit as a result of the name. (R. p. 31)

In February 1937 the applicant's father died and he returned to New York. (R. p. 34) He left the Communist Party at this time and resumed the use of his correct name. (R. p. 34) In 1938 he went to Detroit and apparently rejoined the Party. (R. p. 35) From March 1938 to February 1940 he was Secretary of Wayne County Workers Alliance and subsequently until June 1940 he was State Secretary of the Michigan Workers Alliance, both positions being in Detroit. (R. pp. 35-36) Petitioner was arrested in Detroit in 1940 for violation of the Neutrality Act of 1818 as a result of recruiting volunteers for the Spanish Republican government. (App. Qu. 17b) The charges under which he was arrested were terminated by nolle prosequi. (App. Qu. 17b) In 1940 or 1941 he was arrested in a town in Texas on a charge of "suspicion of transporting a stolen vehicle." (App. Qu. 17b) This charge was dropped by the authorities.

In late 1940 the applicant finally left the Communist Party. (R. pp. 36, 40) He testified he did so based upon disillusionment and the feeling that the party's officers were interested primarily in power. (R. pp. 35-36) During the period of his membership he appears to have been active in the work of the Party. (R. pp. 29-34, 61-63) His actions in connection with his arrests were governed largely by instructions he received from the Party. (R. p. 34)

In response to question in petitioner's written application to take the bar examination asking that he state every residence he had had since he was sixteen years of age, and indicating the name of the city and state, the street address and the period of time by month and year of each separate residence were to be given, petitioner stated that he had had ten different residences during the period March 1934 to January 1943, the latter date being the time he was inducted into the United States Army. (See Application in Record.)

He lived in California, New York, Illinois, Texas, Michigan and Indiana. He could recall only two street addresses. One was the home of his family in New York where he spent three months in 1937; the other was an address in South Bend, Indiana, where he lived approximately two years.

Another question on petitioner's application form sought information as to all employments he had had since the age of sixteen years, specifically asking for the time periods of such employment, exact addresses of offices or places where employed and the names and present addresses of all former employers. From March 1934 to November 1935, petitioner was employed as a machinist's helper at Bethlehem Shipbuilding Company, Terminal Island, San Pedro, California. He could not recall the name of his superiors. He left there to join the merchant marine. He then spent five months as a seaman, first on a freighter. He could not recall the name of the ship, but believed he worked for the Calmar Line, making no statement as to the whereabouts of its offices. Then he left that employment to sail on a steam schooner plying the Pacific Coast. He made no statement as to the name of his employer, or otherwise identified the schooner. After that he worked ten months as a longshoreman on the docks in San Francisco, Oakland and Berkeley, California.

Then after a trip to New York at the time of his father's death, he worked in a grocery store for some four months. He could not recall the name of the store or the owner. He worked two months in a vegetable processing plant in Rio Hondo, Texas. He could not recall the name of the plant or the owner.

The application states that from March 1938 to June 1940 he was in Detroit working with the Wayne County Workers Alliance and the Michigan Workers Alliance. The

offices were located on Grand River Avenue. He gives no names of associates. Upon leaving this work he was unemployed for a while then became regularly employed as a truck driver in South Bend, Indiana, for about two and a half years. One company for which he worked went out of business when the 1942 car production was halted. He gives the name of the company, the owner and the office address of his last employer in South Bend, which corresponds with the period of time for which he had given a residence address as earlier noted. This brought him up to the time when he was inducted into the army.

In January 1944 the petitioner was drafted into the Army, and was honorably discharged in 1946. (R. p. 37) While in the military service, he married, and at the time of the hearing had two children. (R. p. 18) Nine letters which he wrote to his wife while in the service in 1944 were offered as corroborative of his claim to be converted from Communism. (Applicant's Ex. 1-9, R. pp. 84-103) He has become a member of the synagogue in Albuquerque and its Rabbi testified that he was of good moral character. (R. pp. 75-77) Some seventeen letters from law professors and students and business associates were introduced into the record stating that petitioner is a person of good moral character, these letters being from persons who have known the petitioner in New Mexico where he lived from June 1950. (Applicant's Ex. 10, R. pp. 103-109) While in law school petitioner established an anonymous scholarship of \$50.00 a year to be given to needy law students, which he has continued and hopes to continue indefinitely. (R. p. 43)

Following the decision of the respondent Board in 1954 petitioner filed a petition for review in the Supreme Court of New Mexico setting up some twelve bases of objection, including the due process clause of the Fourteenth

Amendment. (R. pp. 1-8) No question was raised as to the plenary power of the New Mexico Supreme Court to review the cause and its review admittedly embraced a decision of the petitioner's claim of denial of due process. (Pet. pp. 1a, 2a) The court regarded its review as plenary and a matter of original jurisdiction. (Pet. p. 1a) Based upon such review the Court adhered to the respondent Board's decision and "ruled that the petitioner's application to take the bar examination of the State of New Mexico is denied."

ARGUMENT

POINT I. NO SUBSTANTIAL FEDERAL QUESTION OF DENIAL OF DUE PROCESS IS PRESENTED BY THE NEW MEXICO SUPREME COURT'S ADHERENCE TO THE FINDING OF ITS BOARD OF BAR EXAMINERS THAT PETITIONER HAS FAILED TO SATISFY THE BOARD AS TO REQUISITE MORAL CHARACTER FOR ADMISSION TO THE BAR WHERE PETITIONER'S APPLICATION AND EVIDENCE INCLUDED: (a) FORMER ADULT AND KNOWING MEMBERSHIP IN THE COMMUNIST PARTY; (b) REPEATED USE OF ALIASES; (c) A NUMBER OF ARRESTS WITHOUT CONVICTIONS; (d) DISCREPANCIES AND OMISSIONS IN INFORMATION AND EVIDENCE SUPPLIED BY THE PETITIONER.

A. Summary of Petitioner's Contentions.

The petitioner has presented his argument under five points of which four may be summarized, referring to the Point numbers of petitioners' argument, as follows:

Refusal to permit the petitioner to take the bar, (I) by reason of former membership in the Communist Party; (II) by reason of his use of aliases, (III) by reason of his record of arrests

without convictions and (V) by reason of all three of the foregoing together, is a denial of the due process of law.

The argument runs that the right to apply for membership in the bar is within the protection of the Fourteenth Amendment; that it cannot be denied by a State for irrational or arbitrary reasons or for reasons involving constitutionally protected rights and liberties; and that none of the three reasons referred to in Petitioner's Points I, II and III are constitutionally adequate to warrant the New Mexico Supreme Court's decision. There is, we believe, some question-begging and glossing over of facts in the phraseology of the petitioner's argument on these Points but we believe that the foregoing is a fair, although abridged, statement of it.

B. Statement of Principles not in Dispute.

The respondent believes that there is an area of agreement between the parties and that it will clarify the argument to delimit this area where the parties are not in dispute:

(1) We take it as undisputed that a state has broad powers in regulating the admissions of persons to the practice of law.

Re Summers, 325 U. S. 561, 570, 571; 89 L. Ed. 1795, 1802

"The responsibility for choice as to the personnel of its bar rests with Illinois. Only a decision which violated a federal right secured by the Fourteenth Amendment would authorize our intervention."

(2) The right to apply for admission to the bar and to practice law, while not unqualified, is a right protected from arbitrary or irrational state action and within the protection of the Fourteenth Amendment.

Re: Summers, supra

But Cf. *Considerations on Determination of Good Moral Character* 18 U. of Detroit L. J., 195, 224

This was assumed in the opinion of the Court below (*Schware v. Board of Bar Examiners*, 60 N. M. 304, 291 P. (2) 607, 608) which proceeded upon the assumption that membership in the legal profession "is a species of property as that word is employed in the Constitution." (Pet. p. 2a)

(3) The requirement that an applicant for the bar be of "good moral character" is ancient and universal.

St. 4 Henry IV, c. 18 (1402)

"... it is ordained and stablished that all Attornies shall be examined by the Justices, and by their Discretions their Names put in the Roll and they that be good and vertuous and of good fame shall be received and sworn"

Re Stepsay, 15 Cal. (2) 71, 73; 98 P. (2) 489, 490

"There is, of course, no question that one of the prerequisites to practice law in this state, and in all other jurisdictions so far as we are advised is the possession on the part of the applicant of a good moral character.

In re Hyra, 15 N. J. 252, 104 A. (2) 609

"From the earliest days in this state it has been a rule of court that 'no person (shall) be admitted to such examination (to practice as an attorney at law) unless he . . . shall be of good moral character.' This rule is not peculiar to New Jersey; it is a universal requirement." (per Vanderbilt, C. J.)

Re Crum, 103 Or. 296; 204 P. 948, 950

"Evidence that satisfies the court of the good moral character of an applicant for admission to the bar is required in all jurisdictions."

We assume, therefore, that a reasonable inquiry into and a fair decision upon an applicant's "good moral character" must be regarded as a part of the due process of law.

(4) Further, we assume it to be undisputed that as a matter of common and possibly universal practice among the several states the burden of proof to establish his good character is on an applicant for admission to the bar.

Re Garland, 219 Cal. 661; 28 P. (2) 354

Rosencranz v. Tidrington, 193 Ind. 472; 141 N. E. 58

Re Weinstein, 150 Or. 1; 42 P. (2) 744

Annotation, 28 A. L. R. 1140 at 1142
18 U. of Detroit, L. J. 195, at 228

"Applicants must, under the rules, carry the burden of proving to the sub-committee that they are of good moral

character and have the necessary qualifications for entry to practice."

This is clearly the case in New Mexico under the language of the rule upon which the respondent Board acted.

Rule III (7) of the Rules Governing Admission to the Bar (found at N. M.S. (1953 Comp.) Vol. 4 p. 87)

"... the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character."

(5) We do not understand that the petitioner contends that there was a lack of *procedural* due process in the present case except for the matters argued under his Point IV which is answered in our Point II in this Brief. Any question of procedural due process in this case is, therefore, limited to the question concerning the alleged evidentiary use of confidential information discussed under our Point II below.

(6) The review of the decision of the respondent Board's action was plenary involving appellate review of law and fact questions and was treated in the court below as "not limited by appellate rules," but the matter is considered originally." (Pet. p 1a)

(7) Finally, it is not here disputed that the decision of the New Mexico Supreme Court was a final judgement within the meaning of 28 U. S. C. 1257, and a justiciable case within the rule of *Re Summers*, 325 U. S. 561; 89 L. Ed. 1795.

C. Decision Appealed from was warranted by the evidence.

Assuming the foregoing seven matters as undisputed, the question here presented seems to be whether the decision of the Supreme Court of New Mexico was warranted that the petitioner had failed to satisfy the Court and the respondent Board of his good moral character. If a rational finding was made in the petitioner's case upon warrantable evidence, the requirements of due process, as we understand them, have been satisfied.

The petitioner in his Point V contends that for the purpose of determining the constitutional adequacy of the evidence, he may inspect and reject each of the three grounds mentioned in the Board's resolution (Pet. p. 1a) separately. It should be remembered, however, that this is a review of a finding on the petitioner's "good moral character"; that, as stated by the court below "Character cannot be laid upon a table" for examination (Pet. p. 1a); and that a survey of all the evidence together is necessary for a fair review of the bases of the court's decision. Each relevant aspect of the evidence "... was a circumstance to be considered and, although taken alone it might not have made out a case, yet, as it was only a portion of the evidence, the ... (Court) ... was not required to rule to that effect, and thus to break one by one the sticks which were relied upon only when bound together in a fagot." (*Collins v. Greenfield*, 172 Mass. 78, 81; 51 N. E. 454, *per* Holmes, J.)

(1) *Former Communist Party Membership.* - The petitioner contends "that past non-innocent membership in the Communist Party might have been constitutionally considered insofar as it might be relevant to Schwere's present moral character." (Pet. p. 10) This concession is in accordance with our reading of the cases. The cases decided by this Court have made a clear distinction between statutory and regulatory requirements which condemn innocent and knowing participation in proscribed organizations. It

is denial of due process to condemn alike persons acting with and without knowledge of the sinister purposes and methods of the Communist Party and its affiliates.

Weiman v. Updegraff, 344 U. S. 183; 97 L. Ed. 216

but *knowing* participation may properly result in disqualification from offices of public trust and importance.

Gerende v. Board of Supervisors, 341 U. S. 56; 95 L. Ed. 745

Garner v. Board of Public Works, 341 U. S. 716; 95 L. Ed. 1317

Adler v. Board of Education, 342 U. S. 485; 96 L. Ed. 517

We assume that it is too clear for dispute that the Communist Party is a conspiracy of disloyalty, deception, violence and disorder and that knowing membership in it is incompatible with accepted standards of "good moral character."

American Com. Assoc. v. Douds, 339 U. S. 382; 94 L. Ed. 925

Dennis v. U. S., 341 U. S. 494; 95 L. Ed. 1137

Adverse inferences from Communist Party membership have been held to warrant exclusion from the practice of law on the ground of lack of good moral character.

Re Anastaplo, 3 Ill. (2) 471; 121 N. E. (2) 826 Cert. den. 348 U. S. 946, reh. den. 349 U. S. 908

Martin v. Law Society of B. C., 3 Dom. L. R. (1950) 173

See also *Sheiner v. State*, (Fla.) 82 S. (2) 657

As a matter of common sense, which must have some relevancy to due process, therefore, former membership in the Communist Party would seem clearly to warrant discreditable and disqualifying inferences unless such membership was as petitioner states "innocent."

Despite the statement in petitioner's Brief(esp. p. 8) there can be no real doubt of *scienter* respecting his Party membership. He was an adult for most of his membership period. He was not merely a philosophical Marxist but was active in the work of the party including arrests in the course of activities it promoted. (Rec. pp. 29, 30, 31, 32) His actions were governed largely by instructions which he received as a member of the Communist party. (Rec. p. 34) He appears to be cognizant of Party discipline and methods. (Rec. pp. 61-63)

In addition to the foregoing, we suppose it is reasonable and fair to infer that one who had been a member of the Communist Party admittedly for six years knew its nature. In *Weiman v. Updegraff*, 344 U. S. 183; 97 L. Ed. 216, the possibility of innocent or unknowing membership in affiliated organizations was discussed and indeed was considered decisive. There is no common sense reason why this principle should apply to membership in the Communist Party itself. Innocent participation in the Communist conspiracy seems to us as to Chief Justice Stone preposterous.

Schneiderman v. U. S., 320 U. S. 118, 195-6;

87 L. Ed. 1796, 1839

Stone, C. J. dissenting: "It would be a little short of preposterous to assert that vigorous aid knowingly given by a pledged Party member in disseminating

party teachings, to which reference has been made, is compatible with attachment to the principles of the Constitution. On the record before us it would be difficult for a trial judge to conclude that petitioner was not well aware that he was a member of and aiding a party which taught and advocated the overthrow of the Government of the United States by force and violence."

To an extent, therefore, the petitioner's past non-innocent membership in the Communist Party constitutionally warranted the decision under review. The reasoning mind would give it weight in evaluating his moral character and consider it as adverse to the petitioner in his efforts to "satisfy" the Examiners of "his good moral character."

(2) *Use of aliases.* The respondent Board of Bar Examiners next relied upon the petitioner's use of aliases for a period of years as a basis of their decision that they were not satisfied as to his moral character. The petitioner appears to have used two names other than his correct name. (Rudolph de Caprio and Joe Fiori or Fliari) throughout the period 1933 to 1937 (App. Qu. 1b and 7) and to have used one name or the other, he cannot remember which, while in the Communist Party presumably until 1940. (Rec. p. 52) While regularly using the name Rudolph de Caprio, on occasions when he was arrested he used the name Joe Fiori just to give to the police. (App. Qu. 1b and 17b and Rec. pp. 30-31)

The petitioner in his Argument describes the foregoing as "the exercise of the ancient common law right to use an alias" (Pet. p. 10) and considers that it is a denial of due process to draw adverse inferences from it. He cites a num-

ber of cases recognizing the validity of voluntary change of name and relies upon the fact that many historical personages have changed their names. There is he contends "an absence of rational relationship" (Pet. p. 12) between use of aliases and inferences adverse to "good moral character." Paradoxically, while now making the argument that the use of aliases is lawful and not discreditable, he contends that there is nothing to show his present attitude towards the use of aliases, although he implies that he now disapproves of the practice. (Pet. p. 10 footnote)

In all candor, is the present case comparable with a voluntary change of name or the professional adoption of a *nom de guerre*? Is it like St. Paul changing his name from Saul of Tarsus as the dissenting judge stated in the Court below (Pet. p. 30a)? We submit that it is manifestly different. The common law right to change ones name properly may be exercised for a lawful purpose (*Re Zanger*, 266 N. Y. 165; 194 N. E. 72) and without intent to deceive (65 C. J. S. 19). An accused's assumption of a false name is universally considered to be evidence of consciousness of guilt and thus of guilt itself. (II Wigmore on Evidence, (3ed.) 111.) Changes of name to escape proof of identity on arrest, and to appear as an Italian the better to organize Italian workers, would seem clearly to indicate a capacity for deceit and subterfuge wholly inconsistent with the nice professional honor required of an attorney at law. We cannot see a candid argument to the contrary. Surely an adverse inference is constitutionally permissible where we believe no rational person would make any different deduction. The Court below cannot properly be said to have denied the petitioner the due process of law (a) in concluding that such conduct indicated former lack of requisite moral character, and (b) in drawing a further adverse inference from the petitioner's present attempted justification of such conduct.

(3) *Record of arrests.* The petitioner treats this portion of the facts rather lightly. His counsel summarizes it by saying that he "had the unfortunate experience of being erroneously arrested three times." (Pet. p. 12) He further states that the New Mexico Supreme Court "ruled that arrest without prosecution or conviction is a bar to admission to the Bar." Both these statements of the Petition are incorrect.

The petitioner stated in his application that he was arrested in 1934 "on a number of occasions" (App. Qu. 1b) and "on several occasions" (App. Qu. 17b) during the maritime strikes in California. At his hearing the petitioner stated that he was arrested twice during a strike or strikes at San Pedro. (Rec. p. 29) He was on these occasions booked for "suspicion of criminal syndicalism" under the name Joe Fiori although he had been using the name Rudolph de Caprio during that period. The petitioner believed that the crime of criminal syndicalism consisted of the commission of an act to overthrow or subvert the state government. (Rec. p. 30) He made no explanation whatever of the conduct that led to his arrest merely pointing out that he had read in a San Pedro newspaper that there were 2-3000 people arrested in about 66 days over 200 of them on "suspicion of criminal syndicalism." (Rec. p. 29) The petitioner was indicted and arrested in 1940 in Detroit for violation of 18 U. S. C. A. § 959 (a). He had been engaged in recruiting volunteers for the Loyalist side in the Spanish revolution. (Rec. pp. 32, 33) The charges were nol-prossed. The petitioner stated that he did not know that his recruiting activity was unlawful. (Rec. p. 33) The petitioner was also arrested in 1940 or 1941 in Texas on suspicion of transporting a stolen vehicle and was released after two or three days investigation which exculpated him. (Rec. p. 33-34)

We have therefore, not three erroneous arrests, as petitioner would have us believe, but an unascertained number of arrests, as to all but the last of which discreditable inferences can properly be drawn. Moreover, the Supreme Court of New Mexico did *not* rule these arrests to warrant of themselves refusal to permit the petitioner to take the bar examination." The court, quite rationally we submit, considered the arrests and the use of aliases and petitioner's present attitude towards them as contra-indicating good moral character. (Pet. p. 21a)

"He does not today appear to bear the weight of this deception upon his employers and the police as dishonesty, but simply as an excusable expedient. Furthermore, he excuses his arrests in California upon the ground that many others were arrested too. With respect to the arrest in Detroit, for activity in violation of a Federal statute, we take it that he regards his work in obtaining recruits for a foreign war as even commendable because he had concluded which side is right."

The record of arrests, their uncertainty in number and details, the lack of adequate explanation of their circumstances and the petitioner's present attitude towards them alike lend support to reasonable misgivings as to the petitioner's moral character.

(4) *Discrepancies and Omissions.* - All of the evidence in the present case came from the petitioner and his witnesses, most of it from the petitioner personally. There were in it two features which the Court below pointed out as warranting, along with the other evidence, its decision.

(a) In his application of December 1953 the petitioner stated that he had adopted his first alias because "I was of the opinion that union organization work would be facilitated if I adopted an [Italian] alias." (App. Qu. 1b) In his oral testimony in July 1954 he stated that he had adopted the name "De Caprio" solely to gain employment (Rec. p. 28) and had used this name solely for this reason in California. (Rec. p. 28) In neither the application nor his oral testimony did he explain why he used the names Rudolph De Caprio or Joe Fiori in the Communist Party nor did he explain the extraordinary circumstances that he was uncertain as to which name he used in that connection. (Rec. p. 52)

(b) The application form which the petitioner submitted calls for considerable detail in information concerning addresses and employments. The purpose of obtaining such information is obvious. The Supreme Court of New Mexico examined the information submitted by the petitioner with considerable care (See Pet. pp. 14a and 15a) and concluded:

"The summation of all this is that for approximately nine years petitioner has provided only one residence address other than the home of his parents in New York. Over that period, he has given only one personal name of an employer, for whom he also gave a completed address in South Bend, Indiana, and only the street name for the location of the two Workers' Alliances he was connected with in Detroit. This adds up to slightly more than a complete blank." (Pet. p. 15a)

D. *The State Court's decision was warranted in a constitutional sense.*

We conclude that the several factors relied upon jointly by the New Mexico Supreme Court in reaching its decision in this case were logically relevant to the issue and that the deductions made by the Court were logical and rational. If this is true there has been no violation of the petitioner's rights, no violation of the due process clause. The petitioner is guaranteed by the Fourteenth Amendment against irrational and arbitrary state action and against invasion of his constitutional rights and liberties. We submit that there is no basis for a claim of any of these in the present cause.

POINT II. NO SUBSTANTIAL FEDERAL QUESTION OF DENIAL OF DUE PROCESS IS PRESENTED BY THE NEW MEXICO SUPREME COURT'S ADHERENCE TO THE FINDING OF ITS BOARD OF BAR EXAMINERS THAT PETITIONER HAS FAILED TO SATISFY THE BOARD AS TO REQUISITE MORAL CHARACTER FOR ADMISSION TO THE BAR WHERE CONFIDENTIAL INFORMATION OBTAINED BY THE BOARD WAS NOT A BASIS OF ITS DECISION NOR OF THE COURT'S DECISION.

A. This Point is responsive to Petitioner's Point IV. (Pet. p. 14) Petitioner there contends that because the respondent Board obtained confidential information concerning him which was not disclosed to him he has been prejudiced. The petitioner's argument refers to this information as "derogatory" and to the informants as accusers". (Pet. pp. 14, 15) He omits reference to the fact that the sworn pleading of the respondent Board is to the effect that its decision was not based upon any such confidential information. (Rec. pp. 112, 113) There is nothing in the record to indicate what the nature of this confidential information may be. And the opinion of the Supreme Court of New

Mexico makes clear that none of the judges who joined in that court's decision even looked at such confidential information. (Pet. p. 6a)

B. The question raised by this Point seems to us to be quite simple. Is there a violation of due process in failing to disclose confidential information which was *not* a basis of either the decision of the Board of Bar Examiners or of the Court? Does the right of cross-examination or confrontation, assuming it, as we do, to be embraced in due process, extend to evidence *not* considered by the finders of fact? These questions answer themselves.

The two cases cited by petitioner do not suggest an affirmative answer. In *I. C. C. v. Louisville & Nashville R. Co.*, 227 U. S. 88; 57 L. Ed. 431, it was held that an Interstate Commerce Commission order lacking supporting evidence could not be considered warranted by an assumption that the Commission acted upon other evidence not in the record. In *Morgan v. U. S.*, 304 U. S. 1; 82 L. Ed 1129, an Agriculture Department's price fixing order was held not to comply with a *statutory* requirement that it be made after a "full hearing." Neither case bears upon the present situation where the petitioner was fully apprised of the evidence upon which the Board's and the Court's decision was based; and, indeed, himself introduced all of the evidence. Rather, the present case would appear to be clearly governed by the principle of *Barsky v. Board of Regents*, 347 U. S. 442; 98 L. Ed. 829, where the decision of the New York Board of Regents was held not to violate due process, there being no showing that the Board in reaching its decision relied upon certain evidence claimed to be irrelevant. The present case is stronger in this respect than the *Barsky* decision since it affirmatively appears that neither the Board nor the New Mexico Supreme Court relied upon the challenged evidence.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1956

No. 92

RUDOLPH SCHWARE,

Petitioner

v.

BOARD OF BAR EXAMINERS OF THE STATE
OF NEW MEXICO,

Respondent

RESPONDENT'S BRIEF

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BOARD OF BAR EXAMINERS OF THE STATE
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Respondent

On Writ of Certiorari to the Supreme Court of the
State of New Mexico

BRIEF OF RESPONDENT

The respondent has no objection to the portions of the Brief of Petitioner entitled Opinion Below and Jurisdiction. With respect to the portion of the Brief, entitled, Constitutional, Statutory and Regulatory Provisions Involved, the respondent desires to cite also the following statutes:

United States Constitution, Amendment XIV, Sec.
1, Clause 2

N. M. S. (1953 Comp.) § 18-1-8

Neutrality Act of 1816, 18 U.S.C. § 959(a)

N.M.S. (1953 Comp.) § 18-1-9

Rules Governing Admission to the Bar of the State
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Communist Control Act. 60 Stat. 775, 50 U.S.C.A.
841

Internal Security Act, 64 Stat. 987, 50 U.S.C.A. 781,
(1), (9), (15)

and the pertinent text of the statutes is placed in the
Appendix of this Brief.

The respondent is dissatisfied with petitioner's statements
required by Rule 40(d) and (e) and therefore makes the
following statements under these provisions of the Rule.

Questions Presented for Review

1. Is it a denial of due process for the Supreme Court
of the New Mexico on plenary review to adhere to the find-
ing of its Board of Bar Examiners that the petitioner "has
failed to satisfy the Board as to requisite moral character
for admission to the Bar of New Mexico" which finding was
made upon petitioner's application for admission to the
Bar and evidence introduced by the petitioner only, which
included the following:

- (a) evidence from which good character could be
inferred:
- (b) history of membership and active and knowing
participation in the work of the Communist party
admittedly from 1932 to 1940 at applicant's ages
of 18 to 26,

- 7
- (c) repeated use of two different aliases during the period of his Communist Party activity,
 - (d) arrests, without convictions, on an unascertained number of occasions,
 - (e) discrepancies and omissions in the petitioner's application and testimony?

2. Is it a denial of due process for the Supreme Court of New Mexico so to adhere to such finding of its Board of Bar Examiners where the Board, upon assurances to informants that it would not disclose the same, had obtained confidential information concerning the petitioner, the nature of which was not disclosed to the petitioner; but where *on the other hand*, this confidential information (a) was not a basis of the Board's decision, and (b) was not considered by the members of the New Mexico Supreme Court who joined in the decision here reviewed?

Statement of the Case

A. Procedural History of the Case

The respondent Board has the function of examining "candidates for admission to the bar [of New Mexico] as to their qualifications, and to recommend such as fulfil the same to the Supreme Court for admission to practice." (N.M.S. (1953 Comp.) s. 18-1-18). Among the required qualifications for admission is that the candidate be "of good moral character" (Rule I (1), Rules Governing Admission to the Bar of the State of New Mexico.) The Board is authorized to decline to permit any applicant to take the bar examination "when not satisfied of his good moral character." (*ibid.* Rule III(7)) The function of the board is recommendatory only. Actual admission to practice in

the case of successful applicants occurs on the approval of the Supreme Court of the Board's recommendation (N.M.S. (1953 Comp.) s. 18-1-18). In cases where an application is rejected, the action of the Board may be reviewed on petition to the State Supreme Court. That court has plenary jurisdiction to review the board's decision and upon such review the court is not limited by appellate rules but considers the matter originally. *Schwartz v. Board of Bar Examiners*, 60 N.M., 304; 291 P. (2) 607).

In the course of making its examination of the qualifications of applicants, it has been the practice of the respondent Board to make written inquiries concerning each applicant. (R. 105) Permission to make these inquiries is required of each applicant upon the explicit understanding that the applicant will not be entitled to receive a copy of the report or to know its contents. (R. 105) Inquiries are made and answers obtained thereto upon the express assurance given to informants that the respondent will hold them in strict confidence. (R. 92, par. 10) This procedure was followed in the present case. (R. 92, 105)

The petitioner attended the University of New Mexico College of Law from September 1950 to January 1954 at which time he obtained his Bachelor of Laws degree. (R. 96) Within a few weeks after he had entered law school, he spoke to the Dean of the Law School and told the Dean of his past affiliation with the Communist Party. (R. 29) The Dean then told him not to tell anybody about having been a member of the Party. (R. 29) The petitioner knew that his former membership might affect his ability to be admitted to the Bar and expected that a hearing would have to be held by the respondent when he applied for admission. (R. 42, 43)

In December 1953 the petitioner applied for leave to

take the bar examination on February 29, 1954. (R. 94) His application forms a part of the record here. (R. 94-105) He was given notice to appear for the examination and when he did so was interviewed by the respondent Board.¹ (R. 2, par 5; 3, par 10; 8) Subsequently, petitioner obtained counsel who asked for a hearing. (R. 2) This hearing was held July 16, 1954, at Albuquerque. (R. 7).

A transcript of this hearing was kept and is a part of the record. (R. 7-89) Evidence was introduced by the petitioner, his wife, and certain character witnesses. In addition, two sets of documents consisting of (1) letters sent by the petitioner in the period March 16, 1944 to June 30, 1944, while he was overseas in the military service (R. 62-84) and, (2) letters of recommendation as to the petitioner's good character. (R. 85-89) No evidence was introduced by the respondent.

At the outset of this hearing, petitioner's counsel asked to be given any data, and the names of any witnesses, which

¹ In the Brief of Petitioner at p. 58, counsel states that

" . . . the Board below originally agreed to permit Schwere to take the bar examination when it had before it the record of arrests and aliases which he had presented to the Board in his application for a character report. It was only after they received the derogatory information against him that they determined that he was ineligible."

This statement is utterly without support in the record and is contrary to fact. The notice to report for examination was, no doubt, sent out as a matter of routine in advance of the meeting of the Board of Bar Examiners who come from all over New Mexico to Santa Fe to conduct the bar examinations. The information in the files of the several applicants was in all probability not considered by the Board of Bar Examiners until they met a day or two in advance of the examinations and some time after the notice to report for examination had been sent to applicants.

had been obtained against the petitioner. (R. 8,9) He was advised that an investigation had been made of a confidential nature and with the written consent of the petitioner. (R. 9,10) The respondent board further advised the petitioner that its original decision to decline to permit him to take the bar examination was not motivated by any such information. (R. 9,11)

At the close of the hearing, the respondent board unanimously affirmed its former action on the petitioner's application. (R. 3, 4, par. 13) In reaching this determination the respondent did not do so on the basis of confidential information the bases of its decision being found in the facts disclosed by the petitioner himself.¹ (R. 92, par. 10, and 93, par. 4)

Following the decision of the respondent Board, the petitioner filed a Petition for Review in the Supreme Court of New Mexico setting up some twelve grounds of objection, including the due process clause of the Fourteenth Amendment. (R. 1-6) Due Response was made to the Petition which admitted the plenary power of the State Supreme Court to review the respondent Board's action. (R. 90-94) In the course of its opinion the Court determined that it had plenary power of review, and that such review was not limited by appellate rules but that the cause should be considered originally. (R. 106) The Court further assumed that the right to apply for membership in the legal profession was a species of property as that word is used in

¹ There is a misprint on page 92 of the record, beginning at Line 22. The sentence beginning on that line should read:

"Further that the respondent does not reach a decision upon applications for admission to the State Bar on the basis of such confidential information so obtained and did not do so in the case of the petitioner in this cause; . . ."

the Fourteenth Amendment. (R. 106-107) The universal rule of law that one applying for admission to practice "places his good moral character in issue and bears the burden of proof as to that issue" was noted and applied. (R. 108) After a detailed examination of the record the Court concluded that the petitioner had not sustained this burden and had not "proved to us that he is a man of good moral character." (R. 126) Based upon this conclusion it was ordered that petitioner's application to take the bar examination of the State of New Mexico be denied. (R. 126)

In the course of its Opinion, the Supreme Court of New Mexico made clear that none of the Judges who joined in the majority opinion had looked at the data obtained upon the confidential investigation made in the petitioner's case, although the single judge who dissented had done so. (R. 110, 111)

Petition for certiorari was filed May 17, 1956, and granted October 8, 1956.

B. Summary of the Evidence

The petitioner was born in January 1914 and at the date of his application was 39 years of age. (R. 95) His father was a needles trade worker, a poor man (R. 16), a socialist (R. 16) and an atheist, (R. 42) The petitioner began to work at the age of nine and continued to work part time while at school. (R. 17, 18) He attended DeWitt Clinton High School in the Bronx, New York from 1928 to 1932. (R. 96) While there, in 1932 he joined the Young Communist League after an occurrence in which the Communist students had impressed him in refusing to disband a club upon the demand of the school principal. (R. 18, 19) In connection with this occurrence, the petitioner was sus-

pended from school approximately three days (R. 104, par. 16(1))

The petitioner joined the Communist Party in 1934 at his age of 20. (R. 19) In September to November 1933, he was employed in a pocketbook factory in Middletown, New York. (R. 100 par. A) For the first time (R. 20) he used an alias, adopting the name of Rudolph DeCaprio. (R. 100) In his written application, he stated that he did so because he desired to organize the employees, a large number of whom were Italian, into a union and that after the workers were organized into a union he returned to New York City and resumed the use of his real name. (R. 100, par A) At the hearing in February 1954, he appears to have re-iterated this statement (R. 34) At the hearing in July 1954, he stated first that he had adopted the Italian name solely to gain employment at a factory in Gloversville, New York. (R. 19, 20) When his attention was called to this discrepancy, he stated that his motive was a combination of both getting the job and organizing the Italian workers. (R. 34-35)

From February 1934 to February 1937, petitioner lived in Los Angeles, San Pedro, San Francisco and Berkeley, California, where he was a shipyard worker, longshoreman, warehouseman and seaman. (R. 101, par B, and 102, par. B 6-8) During the entire period of his residence in California he used the alias Rudolph DeCaprio (R. 100, par. A) This was, he testified, solely to obtain employment since he never did find a Jewish person working in a shipyard. (R. 20, 21).

In the Communist Party, the petitioner used the names Rudy de Caprio or Joe Flori, he does not recall which. (R. 38) In 1934, he was arrested "on several oc-

casions" or "twice" for criminal syndicalism during the maritime strike in California. (R. 103, 21) He had been working under the name Rudy de Caprio in the shipyard (R. 21, 102,) but when arrested used the name Joe Fiori (or Joe Fliari). (R. 22, 100) This name or names were assumed to give the police. (R. 22) He derived no monetary benefit as a result of his use of the name. (R. 22)

In February 1937 the petitioner's father died and he returned to New York. (R. 25) He dropped out of the Communist Party and resumed the use of his correct name. (R. 25) For some months he had transient employment apparently in New York, Chicago, Rio Hondo, Texas, and Indianapolis. (R. 101, 102, 25) From March 1938 to February 1940 he was Secretary of Wayne County Workers Alliance and subsequently until June 1940 he was State Secretary of the Detroit Workers Alliance, both positions being in Detroit. (R. 25, 26, 102, 103.) During the period November 1937 to June 1940, he lived in Detroit but could recall no residence address there. (R. 101)

While in Detroit on February 6, 1940, petitioner was arrested under an indictment for violation of the Neutrality Act (18 U. S. C. § 959(a)) (R. 104) This was a result of his obtaining recruits to fight Franco in Spain. (R. 23) His activity in recruiting for the Abraham Lincoln Brigade had been part of his activity on behalf of the Communist Party in 1937 or 1938. (R. 35) The charges under which he was arrested were terminated by nolle prosequi (R. 105, 23) Petitioner testified that at the time of his activity he did not know he was breaking the law. (R. 23, 24)

The petitioner was also arrested in 1940 or 1941 in Texas on suspicion of transporting a stolen vehicle and was released after two or three days investigation which exculpated him. (R. 24)

In the latter part of 1940 the applicant left the Communist Party. (R. 24, 26) His break with the Communist principles was gradual and he cannot put his finger on a particular date. (R. 51, 52) It may have been as late as 1944 or after he went into the army when he finally repudiated the principles of the Party. (R. 51, 52) During the period of his membership he was active in the work of the Party (R. 34, 35, 52, 53) and understood its objectives. (R. 45, 46, 47, 49) His actions in connection with his arrests in San Pedro and Detroit were governed largely by instructions he had received from the Party. (R. 25) The petitioner testified that he left the Party and subsequently abandoned its principles through disillusionment and because of a feeling that the party officers were interested primarily in power. (R. 25, 26, 33)

Petitioner was inducted into the army in January 1943 (R. 101) or January 1944 (R. 27) and was honorably discharged in 1946. (R. 103) While in the military service, he married and at the time of the hearing had two children. (R. 18, 31) Nine letters which he wrote to his wife from March to June 1944 while in the service were offered as corroborative of his claim to have been converted from Communism. (R. 62, 84) He has become a member of the synagogue in Albuquerque and its Rabbi testified that the petitioner is of good moral character. (R. 55, 56) Some seventeen letters from law professors and students and business associates were introduced into evidence stating that petitioner is of good moral character. (R. 84-89) These letters appear all to be from persons who has known him during his years at Law School in Albuquerque. (R. 84-89) While in law school, petitioner established an anonymous scholarship of \$50.00 a year to be given to needy students, which he has continued and hopes to continue indefinitely. (R. 31, 32, 57)

In response to questions in the petitioner's written application to take the bar examination asking that he state every residence he had had since he was sixteen years of age (R. 95) petitioner stated that he had lived at ten different residences in six states in the period March 1934 to January 1943. (R. 101.) Of these he specified only one beside his father's residence, where he had been very briefly, although partially specifying another. (R. 101) In response to a question requiring detailed employment information since age 16 (R. 97) he responded with somewhat less than specific information. (R. 101-103)

SUMMARY OF ARGUMENT

A. Claimed Lack of Substantive Due Process

The right of a court and of a state to examine applicants for admission to the practice of law as to moral character as well as professional fitness is an ancient and reasonable one and must be considered a part of the due process of law. In accordance with a practice universal among the several states, New Mexico requires that a candidate for admission discharge the burden of proof by satisfying its Board of Law Examiners of his good moral character.

There cannot be a direct inspection of moral character. Any conclusion upon it can be only a judgment based upon a study of the past and present conduct of the subject of the examination aided perhaps by the impressions of others who have observed his conduct. The due process of law requires that such an inquiry be reasonably made and that the conclusions drawn be rational and material. Being rational, the conclusion should be based upon fair inference and logical deduction. Being material, the conclusion should relate to the aims of the inquest — moral fitness to practice

law. The respondent recognizes fully that it would be a distortion of the purpose of such examination of moral character, and a denial of due process, that such inquiry be used as a method of ensuring the admission to practice of only the conventional, the conformist, the orthodox.

The respondent Board is charged by the State of New Mexico with making the inquiry and reaching a decision as to moral character required by its laws. The Board consists of five experienced, and we may say, outstanding, lawyers. The due process of law is understood and valued no less in New Mexico than in the District of Columbia. The respondent Board was charged with the responsibility of finding a fact, or more accurately a recommendation as to a finding of fact, on an issue of patent gravity. Its members observed the demeanor of the petitioner as a witness in his own behalf. They remained unsatisfied of his good moral character.

Upon a complete review as a matter within its original jurisdiction, the Supreme Court of New Mexico likewise found that it did not hold the conviction of the petitioner's "good moral character for the purpose of being given the office of attorney." (R. 126)

The decision below finds warrant in the petitioner's own evidence. He has been an active and knowing member of the Communist Party according to his account from the age of 20 to the age of 26, and admits possibly having adhered to its principles until his age of 30. His disavowal of present membership and claim of conversion was for the respondent Board and for the Supreme Court of New Mexico to evaluate. He has concealed his identity over a period of years under two aliases without, we submit, an innocent explanation. He has been arrested three or more times in

circumstances where adverse inferences as to moral character are reasonable and probable. There exist in his account of himself discrepancies from which the respondent Board and the Supreme Court of New Mexico could, and quite logically, did draw adverse inferences.

The due process of law in this cause required no more nor less than a reasonable inquiry into and a fair decision upon the petitioners "good moral character." New Mexico has not denied the petitioner due process by remaining unpersuaded by the evidence which he presented.

B. Claimed Lack of Procedural Due Process

The refusal of the respondent Board to disclose to the petitioner confidential information obtained concerning him was not a denial of due process. Such information was obtained with the petitioner's knowledge and consent. (R. 105, 10) It was obtained from informants on the respondent Board's explicit assurance that it would not be disclosed but would be held in strict confidence by the Board. (R. 92)

The original decision of the Board in the Petitioner's case was not motivated by this confidential information. (R. 9, 11) The second decision was not reached on the basis of such information but was based upon facts disclosed by the petitioner himself. (R. 92) The Supreme Court of New Mexico in reaching its decision did not even look at this confidential information. (R. 110, 111)

It is not a denial of due process to fail to disclose confidential information which is *not* a basis of decision. The right of cross-examination or confrontation does not extend to evidence *not* considered by the finders of fact.

ARGUMENT

POINT I

The Supreme Court of New Mexico did not deny the petitioner substantive due process of law by refusing to find that he had satisfied the burden of proving his good moral character.

A. Introduction

From the most ancient times, courts have supervised the admission of practitioners of law so as to ensure not only adequacy of legal learning but excellence of moral character.

Starrs, Considerations on Determination of Good Moral Character

18 U. of Det. L. J., 195, 202

"If then by common consent in the ninth century a lawyer should be 'mild, pacific, fearing God and loving justice' (the entire idea of which could just as well be translated 'of good moral character') might it not be reasonable to conclude that there was a general recognition, 1150 years ago, that the public weal demanded a Bar composed of men of probity."

St. 4 Henry IV, c. 18 (1402)

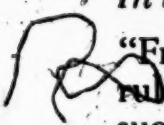
"..... it is ordained and stablished that all Attornies shall be examined by the Justice, and by their Discretions their names put in the Roll and *they that be good and vertuous and of good fame* shall be received and sworn....."

The requirement of good moral character has existed in the courts of all the states from the earliest times.

Re Stepsay, 15 Cal. (2) 71; 98 P. (2) 489, 490

"There is, of course, no question that one of the prerequisites to practice law in this state, and in all other jurisdictions so far as we are advised is the possession on the part of the applicant of a good moral character."

In re Hyra, 15 N. J. 252; 10 A. (2) 609

 "From the earliest days in this state it has been a rule of court that 'no person (shall) be admitted to such examination (to practice as an attorney at law) unless . . . he shall be of good moral character.' This rule is not peculiar to New Jersey; it is a universal requirement." (per Vanderbilt C. J. dissenting.)

Re Crum, 103 Or. 296; 204 P. 948, 950

"Evidence that satisfies the court of the good moral character of an applicant for admission to the bar is required in all jurisdictions."

Moreover, it appears to be a universal requirement of long standing that the burden of proof to establish good moral character is upon the applicant for admission to the bar.

* *Re Garland*, 219 Cal. 661; 28 P. (2) 354

Rosencranz v. Tidrington, 193 Ind. 472; 141 N. E. 58

Re Weinstein, 150 Or. 1; 42 P. (2) 744

Annotation, 28 A. L. R. 1140, 1142.

The law of New Mexico is in accordance with the foregoing summary of the general law. It requires as an essential qualification that an applicant for admission be "of good moral character" (Rule I(1) of Rules Governing

Admission to the Bar of the State of New Mexico.) The burden of satisfying the Board of Bar Examiners of the possession of this qualification is on the applicant for admission and "the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character." (*ibid*, Rule III(7)) *Schware v. Board of Bar Examiners*, 60 N. M. 304, 307; 291 P. (2) 607.

The requirement of "good moral character," like many concepts of the law, might appear to be vague and inexact. (See *Petition of R_____*, 56 F.S. 969, (D.C.Mass.)) However, in its practical application to the admission of attorneys to practice law we see no real difficulty. The context of the requirement compels the conclusion that the nature of "good moral character" be related to its purpose. Its purpose is to ensure that unprincipled persons will not be licensed in a profession where there is grave risk of injury to the public and to the administration of justice from the lack of such character. More specifically, that none will be admitted to practice who are likely to offend the ethical standards of the profession and of the courts as formulated in New Mexico's statutory statement of the duties of an attorney (N.M. St. (1953 Comp.) s. 18-1-9) and in the Canons. So understood, there would appear to be no basis whatever for an attack on constitutional grounds on the rule requiring possession of good moral character. The power of a state to regulate the admission of attorneys to practice law in its courts and to make reasonable requirements touching such admission is too clear for dispute. *Re Summers*, 325 U. S. 561, 570, 571); and the propriety of the requirement that an applicant be of good moral character cannot be challenged. We do not understand that, as such, it is being challenged by the petitioner in this cause.

On the other hand, a state may not under the guise of this rule, or any other rule, exact of an applicant a qualification not reasonably related to the proper purposes to be served by the regulation. This was true under Article I, Section 10 of the Constitution prior to the adoption of the Fourteenth Amendment. In *Cummings v. Missouri*, 4 Wall. 277, this court held unconstitutional as a bill of attainder a requirement for the practice of certain professions in Missouri that the practitioner make oath to the effect that he had not adhered to the Southern cause in the Civil War. In doing so, the Court pointed out that there was "no possible relation" between the claimed disqualifying actions and the petitioners' "fitness for (their) pursuits and professions." The power of the Federal government is subject to a like limitation under Article I, section 9. *Ex parte Garland*, 4 Wall 333. We take it as obvious, and it was so assumed by the New Mexico Supreme Court in this cause, that this prohibition against irrational state action is further sanctioned by the Fourteenth Amendment. (See *Schwartz v. Board of Bar Examiners*, 60 N.M. 304, 306; 291 P. (2) 607.) *Re Summers*, 325 U.S. 561, 570, 571; *Barsky v. Board of Regents*, 347 U. S. 442.

The respondent freely admits that a construction or application of the words "good moral character" which embraced the sense of conformity in religious, political or social ideas would offend the foregoing rules of unconstitutionality. Mere unorthodoxy in any of these fields does not as a matter of fair and logical inference, negative "good moral character," and therefore has no disqualifying relation relevant to the purposes of that requirement. The respondent Board and the Supreme Court of New Mexico, have at all times fully recognized this principle. The Court and its Board of Bar Examiners value the heterogeneity of

opinion and association which forms so characteristic and important part of the American way of life to the same degree as lawyers elsewhere in the United States. There has not been in the present case any thought of departing from these cherished principles.

What has occurred is an investigation, in accordance with the due process of the law of New Mexico (and of the other states of this country), of the moral character of an applicant for admission to the Bar. The subject here under review specifically is whether the petitioner, as a matter of law, has satisfied the burden of proving his good moral character, within the fair meaning of the requirement of the New Mexico Rules establishing the requirements for admission to practice in its court. The New Mexico court has determined that it is not persuaded by his showing, and that it does not hold the conviction that the petitioner "is a man of good moral character for the purpose of being given the office of attorney." (60 N.M. 304, 321; R. 126) If this determination was warranted by fair deduction and logical inference from the record, the challenged decision does not violate the Fourteenth Amendment or Article I, Section 10.

A review of this determination cannot fairly be made by the method of argumentation presented by the Petitioner's Brief. The argument begins with an evaluation as overwhelming and irrefragable of the affirmative proof of good conduct which the petition introduced. Throughout its course, the argument assumes as axiomatic the truth of every assertion and of every favorable or exculpatory inference from every assertion which was made by or on behalf of the petitioner. Considered substantively, the petitioner's argument places the burden of proof upon the respondent Board, exactly contrary to the correct rule of

law. Moreover, the argument for the petitioner purports to inspect and reject seriatim the several evidentiary grounds upon which the Court and the respondent Board relied for their decision without regard for their cumulative and mutually corroborative effect. In the words of Mr. Justice Holmes, petitioner would "break one by one the sticks which were relied upon only when bound together in a fagot." *Collins v. Greenfield*, 173 Mass. 78, 81; 51 N. E. 454.

The inspection of moral character cannot be a matter of objective proof. As the Supreme Court of New Mexico put it, "Character cannot be laid upon a table." (R. 109, 60 N.M. 304, 307.) A judgment as to character must be based on a review of information concerning behavior whether directly observed, disclosed by the subject himself, or related by others. The question in the present case then is simply this: As a matter of rational deduction does the evidence concerning the petitioner's past conduct require the conclusion that he has established his good moral character as a matter of law thereby requiring the conviction that "he is a man of good moral character for the purpose of being given the office of attorney?" Unless the answer to this question is in the affirmative, petitioner must fail. For, if an adverse decision be logically permissible, we have in the challenged decision no violation of due process. This court, we submit, should not substitute its judgment for that of New Mexico on issuable facts.

B. It was not a denial of due process to decline to give decisive effect to the evidence tending to show petitioner's good moral character.

The petitioner has stated in detail (Brief, 8-10) the affirmative proof which he introduced tending to show his good moral character. This consisted of proof of creditable

acts, religious conviction and written and oral recommendations as to his character. The latter were all by persons who had known the petitioner only since 1950 while he was attending law school in Albuquerque. The petitioner asserts that this evidence was not considered by the Court below. (Brief, 19)

There is nothing in the record to warrant such an assertion. The claim that this evidence was not considered can only mean that the petitioner considers that it is entitled to conclusive effect and that failure to give it this effect amounted to disregarding it. We know of no rule of law or reason that supports this claim. As we have already noted, the burden of persuasion was on the petitioner. If we are correct in our contention that there was evidence from which lack of good moral character was properly inferable, there is no basis whatever for the claim that the evidence tending to show good character compelled an inference of good moral character. The evaluation of this evidence was for the respondent Board in the first instance and ultimately for the Supreme Court of New Mexico. Even in the case of uncontradicted testimony directly on an issue, the trier of fact is not bound to follow it where its credibility is rationally questionable. *Medler v. Henry*, 44 N. M. 275, 101 P. (2) 398.¹ Here, from the nature of the issue, direct proof of good moral character is not possible and the inferences to be drawn from indirect proof are obviously for the trier of fact.

Moreover, the recommendatory evidence on this issue, on fair evaluation can hardly be characterized as over-

¹By coincidence, the opinion in this case was written by the chairman of the respondent Board while he was on the New Mexico bench.

whelming. It relates entirely to the period while the petitioner was attending law school. Several of the letters on inspection appear to be rather guarded in language. (See e. g., letters of Heister H. Drum, R. 84; Terrance L. Dolan, R. 85; Mrs. F. C. Lefton, R. 86; Louis B. Ogden, R. 87; Ruby B. Quillen, R. 88) It is rather remarkable, we believe, that one fellow student actually refused to give petitioner such a letter. (R. 32) As a practical matter, recommendatory letters and testimony of this kind can fairly be assigned little weight to countervail adverse evidence. In *In Re Keenan*, 314 Mass. 544; 50 N. E. (2) 785, some sixty witnesses testified as to the good character and reputation of a disbarred attorney seeking reinstatement. The court observed that:

"Evidence of character or reputation from friends or acquaintances is usually subject to discount for the complacency of witnesses who are willing to be accommodating and many of whom although sincere, may not fully appreciate the necessity of protecting the public interest."

C. The evidence of past membership in the Communist Party warranted adverse inferences on the issue of the petitioner's good moral character.

One of the bases of the respondent Board's determination that it was not satisfied as to the petitioner's good moral character was his admitted former membership in the Communist Party. (R. 84) The Supreme Court of New Mexico unquestionably based its decision in part on this same ground. (R. 124, 125) There is presented therefore the question of the constitutional tenability of an inference adverse to good moral character from the evidence in this cause touching the petitioner's membership and activities in the Party.

To recapitulate, the evidence indicated membership in the Young Communist League from 1932 to 1934 at the petitioner's ages of 18 to 20; and in the Communist Party from 1934 to 1940 at the ages of 20 to 26, with a period of claimed interruption of membership in 1937. The petitioner testified that he left the Party in 1940. He further testified that he did not finally repudiate its principles until 1944 after he went into the army, it may have been after he left. (R. 51) A letter written by the petitioner in 1944 (R. 81) was considered by the Supreme Court of New Mexico, quite rationally we submit, as reflecting doubt upon his claim to have been, by then, a disillusioned ex-Communist. (R. 123) He claims, without corroboration, that after he left the Party he went on one occasion or a couple of occasions and volunteered his services to the F. B. I. apparently to combat Communism. (R. 26)

The Supreme Court of New Mexico and the respondent Board apparently considered it a fair inference from the record that during his period of admitted Party membership the petitioner was active in the work of the Party and not merely a philosophical Marxist. He appeared to have been active in the work of the Party. (e.g., R. 34-35, 52-53) and to have understood its objectives. (R. 45-49) His actions relating to his arrests in San Pedro and Detroit were governed largely by instructions received from the Party. (R. 25)

The New Mexico Court concluded that the evidence indicated knowing adherence to the Communist Party during responsible adult years and that this along with other evidence warranted reasonable doubt of good moral character. It did not, as petitioner seems to claim, announce a principle that all ex-Communists were *ipso facto* disqualified from admission to the bar of New Mexico. We submit

that this determination by the Court was rational and fell within its constitutional power.

The inference from membership in the Communist Party to relevant dubiety in moral character seems to us entirely rational. In requiring that its attorneys be of good moral character, New Mexico includes patriotic loyalty and freedom from deception. These requirements fall fairly within the meaning of "good moral character." They are embraced in the statutory statement of the duties of an attorney (N.M.S. (1953 Comp.) s. 18-1-19) which closely follows the traditional attorney's oath in general use in this country. These characteristics are surely *relevant* to the purpose of the rules regulating the admission of attorneys to practice.

That the Communist Party offends as to both loyalty and deception, and that its members are reasonably suspect in these respects would hardly seem debatable. The Congress of the United States, after extensive investigation has made careful and decisive findings on the point:

Communist Control Act, 68 Stat. 775, 50 U.S.C.A. 841 (1954)

"The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States"

Internal Security Act, 64 Stat. 987; 50 U.S.C.A. 781 (1950)

"As a result of evidence introduced before various committees of the Senate and House of Representatives, the Congress finds that —

(1) there exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means deemed necessary to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of world-wide Communist organization

(9) In the United States those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement."

The general nature of the Party has been fully discussed to like effect in the opinions of this court and of its Justices.

See e. g. *American Communications Assoc. v. Douds*
339 U. S. 382, especially Mr. Justice
Jackson's opinion at pp. 424-434

Dennis v. U. S., 341 U. S. 494

In the light of the foregoing we submit that adverse inferences as to relevant moral character are permissible from the fact of active and knowing Communist Party membership. So far as we are aware, every court that has passed upon the point has regarded membership in the Communist Party as logically relevant to fitness to practice as a lawyer.

Re Konigsberg, (Calif. S.Ct. 1955)
(without opinion)

Re Anastaplo, 3 Ill (2), 471; 121 N. E. (2) 826;
cert. den. 348 U.S. 946; reh. den. 349 U. S. 908

Martin v. Law Soc. of B.C., 3 Dom L. R. (1950) 173

See also

Sheiner v. State, (Fla.) 82 S. (2) 657
(not officially reported)

Nor does the fact, if it be a fact, that the petitioner's membership in or allegiance to the Communist Party has terminated deprive the evidence of membership of logical and constitutional relevance. It is a rule of law as well as sound reasoning that past conduct is relevant to present character.

Garner v. Board of Public Works, 341 U.S. 716, 720

"Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

The petitioner contends that there is no logical relevance between past Party membership and present moral fitness to practice law. (Brief, 38-40) He bases his contention in part on a claimed parallelism between Party membership in this case and adherence to the Southern cause in *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, referring to the claimed disqualification of the petitioners in those cases as "draft dodging" and "sympathy with revolutionists" in order to support his analogy.

The claimed disqualifying conduct in the *Cummings*

and *Garland* cases had no relationship whatever to the petitioners' fitness for their occupations as this Court held. Not even in the bitterness of the Reconstruction was it claimed that adherence to the Southern cause was morally reprehensible in the sense that adherence to Communism is now recognized to be reprehensible. The issue of moral character implicit in the techniques of modern Communism are in no measure comparable to the issues presented in the *Cummings* and *Garland* cases.

The petitioner makes the further points that even though morally objectionable, his participation in Communism was idealistically inspired, lawful, an exercise of the right of free association, and occurred at a time so remote that it should be disregarded. He suggests that his participation was not shown to be "knowing" or with *scienter* because of the possibility that he may himself have been a rank-and-file dupe of Communism and not one of the inner circle of leaders of the conspiracy.

Here we are dealing with factual questions on an issue as to which the petitioner had both the burden of proof and the sole means of knowledge. Neither respondent Board nor the New Mexico Court could, we submit, properly be required to assume petitioner's good motives in having joined the Party. Nor is there proof of compelling persuasion that he had remained a rank-and-file member or had not entered the "esoteric party" referred to in the petitioner's Brief. The Board and the Court below, we submit, were not bound to accept petitioner's self-serving suggestions as to his motivation nor exculpatory explanations of his participation if, indeed, there be any on a fair appraisal of the record. Surely the Due Process Clause does not thus circumscribe the authority of a State's Board of Bar Examiners nor of a State Supreme Court.

Nor can the claimed fact that the disloyal and mendacious nature of Communist activity had not been determined and declared by Congress and the courts prior to the date when the petitioner claims to have left the Party deprive his participation of logical relevance. To begin with, it is not a reasonable interpretation of *Schneiderman v U. S.* 320 U. S. 118 (1943) to assert, as petitioner does, that in that case "the Government had therein failed to prove the existence of any nefarious aims of the Communist Party" (Brief 23) or that the Party was there "tested in Court and not found wanting." (Brief, 40) In that case, membership in the Party was held by a majority of this Court not to warrant denaturalization. That decision affords no reasonable basis for an assertion that in 1943 and prior thereto the nature of the Communist Party was not a matter of general knowledge. But whether then known or later discovered makes no rational difference to the petitioner's case. This is not a proceeding to impose a punishment for an offence, not unlawful when committed, but an inquiry into the existence of good moral character.

In re Rouss, 221 N. Y. 81; 116 N. E. 782

"To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character like an examination into learning is merely a test of fitness."

Bar examiners and Courts have never been limited to the consideration of criminal conduct in inquiring into an applicant's good moral character.

See e. g.

Ex parte Keeley, (Ore) 189 P. 885
(not officially reported)

Re Bowers, 138 Tenn. 662; 200 S. W. 821

Moreover, there can be no real doubt of the validity of a finding of *scienter* in this case. This is not a case like *Wieman v. Updegraff*, 344 U. S. 183, in which knowing and unknowing participation in proscribed affiliates of the Communist Party were alike condemned. There would appear to be no sensible reason why the principle of that case should be applied at all to membership in the Communist Party itself as distinguished from its affiliates. Unwitting membership in the Communist Party seems to us, as to Chief Justice Stone, preposterous. *Schneiderman v. U. S.* 320 U. S. 118, 195-196. Here, however, the evidence clearly supports the determination of the respondent Board and the Court below that the petitioner had *knowingly* given his loyalties to the Communist Party (R. 124)

Finally, the determination of the New Mexico Court does not amount, as petitioner claims, to an automatic and permanent disqualification from the Bar of all former Communists. The fact of former Party membership and activity was given weight along with the other evidence contraindicating good moral character. In the light of this evidence and other evidence, the Court after careful review found itself unconvinced of requisite moral character. We are not dealing here with a prohibitory statute or rule of general application; but with a finding of the Supreme Court of a sovereign State on an issue peculiarly within its province and within a judicial jurisdiction of venerable antiquity. Nothing in the Due Process Clause, we submit, limits the power of the New Mexico court to make the challenged inference nor required it to make a contrary one in the present case.

D. The evidence of use of aliases warranted adverse inferences on the issue of petitioner's good moral character.

Both the respondent Board and the Supreme Court of New Mexico relied in part on the petitioner's use of aliases in arriving at their determination that they were not satisfied of his good moral character. The petitioner contends that the evidence in this case touching the use of assumed names does not permit a rational adverse inference on this issue.

To recapitulate the evidence, the petitioner began using the name Rudolph De Caprio in the fall of 1933 when he was employed in a pocketbook factory in Middletown, New York (R. 100) or in Gloversville, New York. (R. 19, 20) His purpose was either to be able the better to influence Italian workers to join a union (R. 100, 34) or solely to gain employment by passing himself off as Italian, (R. 19, 20) or he had both these purposes. (R. 34, 35) After the union was organized, he returned to New York City and resumed his true name. (R. 100) In February 1934 to February 1937 petitioner lived at several California points (R. 101, 102) and during the entire period of residence in California used the name Rudolph De Caprio. (R. 100) He states that he did this solely to obtain work in a shipyard where he had never seen a Jewish person employed. (R. 20, 21)

In the Communist Party, the petitioner used the names Rudy De Caprio or Joe Fiori, he does not recall which. His active membership in the Communist Party continued until 1940. (R. 24, 26) When arrested while in California in 1934, he used the name Joe Fiori or Joe Fliari. (R. 22, 100) This name or names was assumed just to give

to the police (R. 22) and he derived no monetary benefit as a result of that name. (R. 22).

The foregoing conduct is characterized by the petitioner as "the exercise in the remote past of the ancient common law right to use an alias." He contends that the Due Process Clause prevents adverse inferences from it. He cites a number of cases recognizing the validity of voluntary changes of name and relies upon the fact that many historical persons have changed their names. Paradoxically, while now making the contention that the use of aliases is lawful and not discreditable, he contends that there is nothing to show that he presently condones the use of aliases. (Brief, 43 fn.) At the same time, he has testified that he never intends again to use an alias. (R. 38).

The respondent Board and the Court appear to have drawn adverse inferences as to moral character from this evidence and not to have accepted the exculpatory (and inconsistent) explanation offered by the petitioner. This seems to us completely rational. We believe that any reasonable person would draw adverse inferences from a personal history of concealment of identity as shown in the record. Moreover, the use of an alias or false name in the context of the present case throws some light on both the nature of his Communist membership and on the possible innocence of his arrests which were also matters for consideration by the Board and the New Mexico court. We believe that an intelligent layman would be startled by a contention that an adverse inference as to moral character could not, by reason of the Due Process Clause, be made by a State from this evidence.

The fact that historical figures have changed their names or that writers and actors and other persons have

adopted and changed their professional names has nothing to do with the logical relevance of this evidence. The common law right to change one's name may properly be exercised for a *lawful* purpose. (*Re Zanger*, 266 N. Y. 165; 194 N. E. 72) and without intention to deceive (65 C. J. S. 19). On the other hand, an accused's assumption of a false name is universally considered to be evidence of consciousness of guilt and thus of guilt itself.

2 Wigmore on Evidence (3ed. 1940) s. 276, p. 111

The cases are legion that in criminal cases the adoption or giving of an assumed name is always relevant to show such consciousness of guilt.

See e. g.

People v. Cox, 29 Cal. App. 419; 155 P. 1010

State v. Davis, 6 Ida. 159; 53 P. 678

State v. Stewart, 65 Kan. 371; 69 P. 335

Halfyard v. People, 77 Colo. 390; 237 P. 151

State v. LaPlant, 149 Or. 615; 42 P. (2) 158

State v. Miller, 164 Wash. 441; 2 P. (2) 738

The giving of a false name by the petitioner on the occasion of his arrests would seem clearly to fall within the ground of relevancy illustrated by the foregoing cases. The same principle would seem logically operative on his use of a false name in the Communist party. We submit that a parallel basis of relevancy in a civil action would make the same type of evidence relevant in such case. The very basis of relevancy is that rational relevant inferences can be drawn from evidence of this type. As a matter of common sense no reasonable man would make a different inference.

The petitioner contends that there was no deception, or pardonable deception, in all the occasions of his use of an alias and that the use of aliases was too remote in time to be a valid basis for inference as to present character. These are factual matters on which the decision of the respondent Board and the Court below should be controlling. They were not bound to accept his exculpatory explanations any more than a jury would be. *People v. Cox*, 29 Cal. App. 419; 155 P. 1010, 1011. Petitioner's assertion that giving a false name to the police while he was in their custody could not have materially misled them (Brief, 46) is palpably absurd. His lack of a candid explanation of his use of false names in the Communist Party and his claim that he could not remember which name or names he used during his six years of Party membership reinforce a doubt as to his present character rationally engendered by the record of his past conduct. It was exactly the kind of testimonial vagueness and inadequacy that would impress any trier of fact unfavorably.

The Court below did not deny due process in giving probative value to this evidence adverse to the petitioner.

E. The record of arrests warranted adverse inferences on the issue of petitioner's good moral character.

The New Mexico court in connection with its review of the respondent Board's action drew from the petitioner's evidence concerning his arrests some conclusions in support of its general conclusion that it was not convinced of petitioner's good moral character. It did not announce a rule of general or specific application that mere arrests would warrant exclusion from the practice of law as the petitioner appears to contend. (Brief, 47) (Cf. *Slochower v. Bd. of Ed. of N. Y.*, 350 U. S. 551) Without being repetitious, it

seems necessary to point out once more that the inquiry before the respondent Board and the New Mexico Court related to the petitioner's good moral character. Is it due process in the course of such an investigation to consider and weigh evidence touching arrests like that shown in the record here? This rather than the propriety of a rule of automatic disqualification for the mere fact of an arrest or arrests is the question here. Nor does the question relate to the adequacy of the circumstances of an arrest or the arrests to warrant a criminal conviction.

Logically, it would seem that such inquiry is on solid ground in any investigation of moral character. Applicants for any public or private employment or office are asked questions of this kind as a matter of daily routine and their answers to questions touching arrests are weighed and considered in every personnel office in the country. (See *Garner v. Bd. of Public Works*, 341 U. S. 716, 720.) May not a State make similar inquiry and exercise similar judgment in the process of ensuring itself a Bar of good moral character? The answer seems to us obvious.

The record indicates that petitioner was arrested in 1934 "on a number of occasions" (R. 100) or "on several occasions" (R. 104) or on "two" occasions (R. 21) in San Pedro during the maritime strikes in California. He was booked for "suspicion of criminal syndicalism" under the name Joe Fliari (Fliori?) although he was at that time normally using the name Rudolph de Caprio. (R. 104, 100). The petitioner believed that the crime of criminal syndicalism consisted of the commission of an act to overthrow or subvert the State government. (R. 21, 22). The petitioner gave no explanation whatever of the specific conduct which led up to his arrests on any of these occasions. His actions in connection with this arrest were governed largely

by instructions he had received from the Communist Party. (R. 25) He had learned from the files of the San Pedro newspaper that there were approximately 2-3000 people arrested in the course of about 66 days approximately, over 200 on a charge of suspicion of criminal syndicalism. (R. 21)

The petitioner was arrested in 1940 under an indictment charging violation of the Neutrality Act. 18 U.S.C.A. s. 959(a) (R. 22, 104) He had been engaged in recruiting volunteers for the Loyalist side in the Spanish revolution. (R. 23, 35) The charges were nol-prossed. (R. 23) The petitioner stated that he did not know his recruiting activity was unlawful. (R. 23, 24) His activity in recruiting for the Abraham Lincoln Brigade had been part of his work for the Communist Party (R. 35) and in connection with this arrest also his actions were governed by instructions he had received from the Party. (R. 25)

The petitioner was also arrested in 1940 or 1941 in Texas on suspicion of transporting a stolen vehicle and was released after two or three days investigation which exculpated him. (R. 105, 24)

The evidence therefore does not show three arrests, as petitioner stated in his Petition (Petition 12) or four arrests as he states in his Brief (Brief, 47) but an unascertained number of arrests. Moreover, the evidence does not fairly indicate that any but the last of these was erroneous or in innocent circumstances. The conduct that led up to the arrests for criminal syndicalism is completely unexplained except that it is clear that whatever his actions at those times they were governed by instructions from the Communist Party. We are asked to assume that his conduct was innocent and that he was wrongfully arrested under a statute of a sister state that is, in effect, dismissed as neg-

ligible. The nature and extent of the conduct leading up to his indictment under the Neutrality Act is clearer on the record. The petitioner appears to have recruited personnel for the Abraham Lincoln Brigade as a part of his Communist party activity. The suggested inference is that this also was innocent or negligible. We believe it is a fair inference from the record that petitioner presently regards all of these arrests as venial or even laudable.

We respectfully submit that any rational finder of fact would draw adverse inferences as to moral character from the evidence touching the arrests. This, not only as an inference from past conduct but also from present attitude. The respondent Board and the Supreme Court of New Mexico did so. The making of such inference was within their power and not a violation of the Due Process Clause.

F. Discrepancies and omissions on the petitioner's part warrant an adverse inference on the issue of good moral character.

There were discrepancies and omissions in the application and evidence submitted by the petitioner which were noted by the Supreme Court of New Mexico in reaching its decision. (R. 113, 119, 120) These included the varying explanations of the purposes and circumstances in which he used an alias recited above (*supra*. p. 29) They further included the Court's examination of the personal history information included in his application, (R. 118-119) which caused the Court to comment as follows: (R. 119):

- "The summation of all this is that for approximately nine years petitioner has provided only one residence address other than the home of his parents in New

York. Over that period, he has given only one personal name of an employer, for whom he also gave a completed street address in South Bend, Indiana, and only the street name for the location of the two Workers Alliances he was connected with in Detroit. This adds up to slightly more than a complete blank."

It is submitted that it is not irrational to attach significance to the discrepancies noted and to draw inferences as to present moral character adverse to the petitioner from them. They are, moreover, relevant to an evaluation of the innocence or non-innocence of the petitioner's Party activity, use of aliases or arrests. The omissions likewise are of rational relevance and significance. The absence of specific data covering this period of the petitioner's adult life is a matter that the finder of fact could quite properly and rationally consider.

G. Conclusion

We have here the review of a finding of fact made by a Court in the proceeding under a traditional jurisdiction of courts of the common law "well within the degree of reasonableness required to constitute due process of law in a field so permeated with public responsibility as that of" the administration of justice. (*Barsky v. Board of Regents*, 347 U. S. 442, 453.) The factual issue for determination was conviction of good moral character and on this issue under the law of New Mexico the petitioner had the burden of persuasion. *Schware v. Board of Bar Examiners*, 60 N. M. 304; 291 P.(2) 607. The duly constituted Board of Bar Examiners of the State of New Mexico has found against such conviction and that petitioner "has failed to satisfy the Board as to the requisite moral char-

acter for admission to the Bar of New Mexico." (R. 8) The Bar Examiners consist of five distinguished members of the bar of New Mexico (R. 125) selected by the governing board of its bar and approved by its Supreme Court for this responsible position. (N.M.S. (1953 Comp.) § 18-1-8) There is nothing in the record to indicate a capricious, irrational or prejudiced decision on their part. Under general principles, there is a strong presumption to the opposite effect. The respondent Board understands and cherishes the due process of law and submits that it has not denied it in this cause.

The determination of the Board has been reviewed fully as a matter of original jurisdiction by the Supreme Court of New Mexico. The Court found itself also unconvinced of the petitioner's good moral character by his showing. In doing so, they relied on logical and rational inference from relevant facts. They did not announce a rule of automatic exclusion of general or special application on any of the grounds which petitioner has argued. The decision does not offend the Due Process Clause.

POINT II

It was not a denial of due process of law to refuse to disclose to petitioner confidential information concerning him which was not a basis of the decision of the respondent Board nor of the New Mexico Supreme Court.

A. Introduction

This Point is responsive to Point IV of petitioner's Brief. Petitioner there contends that because the respondent Board obtained confidential information concerning him which was not disclosed to him, he has been prejudiced in his constitutional rights. The facts relevant to this Point are these.

In the course of its examination of the qualifications of applicants for admission to the Bar of New Mexico the respondent Board makes written inquiries concerning each applicant. (R. 105) Permission to make these inquiries is required of each applicant upon the explicit understanding that the applicant will not be entitled to receive a copy of any report or know its contents (R. 105) Inquiries are made and answers obtained upon the express assurance given to informants that the respondent will hold them in strict confidence. (R. 92, par. 10) This procedure was followed in the present case.¹

At his second hearing before the respondent Board on July 16, 1954, petitioner's counsel asked to be given any data, and the names of any witnesses, which had been obtained against the petitioner. (R. 89) He was advised

¹ We are informed that this procedure in New Mexico is substantially identical with that in many, and perhaps all, states.

that an investigation had been made of a confidential nature and with his consent (R. 9, 10); and that this confidential information was not available for his inspection. (R. 9, 10, 11) He was further told that such confidential information is only used to check applicants' information and that the Board never has done anything to the detriment of an applicant on the basis of such hearsay information. (R. 10) The Board also told him that he could not assume there was nothing adverse in the confidential information, (R. 11) but that the original decision not to permit him to take the bar examination was not motivated in any way by such information. (R. 9, 11) In its *sworn* pleading, the respondent Board further certified that it does not reach a decision upon application for admission to the State Bar on the basis of such confidential information and did not do so in the case of the petitioner (R. 92, par. 10 and see footnote *supra* p. 6); further, that the bases of decision of the Board in this case are not to be found in such confidential information, but that such decision is based upon facts disclosed by the petitioner himself. (R. 92, par 10)

In the Supreme Court of New Mexico, where the petitioner's cause was reviewed as a matter of original jurisdiction, none of the judges who joined in the decision of the Court looked at this information, although the single judge who dissented appears to have done so. (R. 110, 111)

B. Refusal to disclose confidential information not relied upon in decision was not a denial of due process.

The constitutional rights of the Petitioner were not violated upon the foregoing facts. These rights require that no person be deprived of rights or liberties on the basis of evidence not subject to the constitutional and due process

requirements of confrontation and cross-examination. The respondent Board appears to have had knowledge and appreciation of these rights in their application to the specific fact situation under study here. (R. 10-12) It is undisputed here, as it was at the Board hearing and in the Court below (R. 110-111), that a decision based upon this type of hearsay evidence would violate due process. (*Peters v. Hobby*, 349 U. S. 331, esp. concurring opinion of Mr. Justice Douglas, pp. 351-353) This is not the situation presented on the present facts.

We have, on the contrary a decision clearly *not* based upon such improper evidence. It affirmatively appears that neither the Board nor the Supreme Court of New Mexico relied upon the challenged evidence at all. There is not the slightest reason for doubting the sworn statement of the respondent Board, or the judicial avowal of the Supreme Court of New Mexico that the confidential information was not a basis of decision; nor to attempt to construe either of these as meaning anything less than that the challenged evidence was given no effect whatever in the decisive process. We know of no decision, and none has been cited, which requires a disclosure in these circumstances. To require disclosure will avail nothing and would result in the respondent Board's violating its specific commitment to informants.

The decision of this Court and the dissent of Mr. Justice Frankfurter in the *Barsky* case (347 U. S. 442) alike support the respondent on this issue. There the Court held that the decision of the Board of Regents of New York could not be found to violate due process by reason of the receipt of certain irrelevant evidence, there being nothing sufficient to sustain the conclusion that the Board or its committees had relied upon such evidence. Mr. Justice

Frankfurter considered that, where it was uncertain as to whether or not reliance had been placed on the improper evidence, a violation of due process existed. In the present case, it is a matter of certainty that neither the respondent Board nor the New Mexico Supreme Court relied upon the challenged evidence.

It follows that there was not a denial of due process in refusing to permit the petitioner to examine the confidential information. The right of confrontation or cross-examination does not extend to evidence not considered by the finders of fact in reaching their decision.

CONCLUSION

This court should affirm the judgment of the Supreme Court of New Mexico.

Respectfully submitted,

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APPENDIX

Constitutional Provision

United States Constitution, Amendment XIV, Section 1, Clause 2: "... nor shall any State deprive any person of . . . property without due process of law."

Statutory Provisions

N. M. S. (1953 Comp.) § 18-1-8: "With the advice and approval of the Supreme Court, the board [of commissioners of the state bar] shall have power to constitute and appoint five (5) members of the state bar as a special committee to examine candidates for admission to the bar as to their qualifications, and to recommend such as fulfill the same to the Supreme Court for admission to practice under this act. The approval by the Supreme Court of such recommendations shall entitle such applicants to be enrolled as members of the state bar and to practice law, upon taking oath to support the Constitution and the laws of the United States and the State of New Mexico. Such special committee shall be known as the state board of bar examiners" (Adopted as N.M. Sess. L. 1925, c. 100, § 7, amended N. M. Sess. L. 1949, c. 22 § 1. Now found in N.M.S. (1953 Comp.) Vol. 4, pp. 84-85).

Neutrality Act of 1816. 18 U.S.C. § 959(a): "Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than \$1,000 or imprisoned not more than three years, or both."

Duties of Attorneys. (N.M.S. (1953 Comp.) § 18-1-9): "It is the duty of an attorney at law:

(1) To support the Constitution and the laws of the United States and of this state;

(2) To maintain the respect due to courts of justice and judicial officers;

(3) To counsel or maintain no other action, proceeding or defense than those which appear to him legal and just, excepting the defense of a person charged with a public offense;

(4) To employ for the purpose of maintaining causes confided to him such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;

(5) To maintain inviolate the confidence and preserve the secrets of his client;

(6) To abstain from all offensive personality and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which he is charged;

(7) Not to encourage either the commencement or continuation of an action or proceeding from any corrupt motive of passion or interest;

(8) Never to reject for any consideration personal to himself the cause of the defenseless or oppressed."

Communist Control Act. 60 Stat. 775, 50 U.S.C.A. 841

"The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Gov-

ernment of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties but denying to all others the liberties guaranteed by the Constitution."

Internal Security Act. 64 Stat. 987, 50 U.S.C.A. 781

"As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that —

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

SY
* * * * *
(9) In the United States those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.
* * * * *

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, the overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

RULES

Rules Governing Admission to the Bar of the State of New Mexico, now found in N. M. S. (1953 Comp.) Vol. 4, pp. 85-89):

RULE I. *Qualifications:* "(1) * * * An applicant for admission to the Bar either upon examination or certification and motion must be a citizen of the United States, an actual bonafide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character * * *."

RULE III: *Examinations:* "(7) * * * Provided that the Board of Bar Examiners may decline to permit any such applicant to take the examination when not satisfied of his good moral character."

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IN THE

Supreme Court of the United States

October Term, 1956

No. 92.

RUDOLPH SCHWARTZ,

Petitioner,

vs.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW
MEXICO,

Respondent.

Motion for Leave to File Brief of Harriet Buhai as
Amicus Curiae and Brief Amicus Curiae.

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IN THE
Supreme Court of the United States

October Term, 1956

No. 92.

RUDOLPH SCHWARE,

Petitioner,

vs.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW
MEXICO,

Respondent.

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE.**

*To the Chief Justice and the Associate Justices of the
Supreme Court of the United States:*

Miss Harriet Buhai hereby moves for leave to file a brief on the merits as amicus curiae in *Schware v. Board of Bar Examiners of the State of New Mexico*, No. 92 on the current docket of this Court, in which certiorari has been granted by this Court. Said motion is made pursuant to Rule 42(3) of this Court.

Movant has attempted to obtain the consent of the parties to the filing of such a brief. Petitioner has indicated his consent thereto but counsel for respondent has refused to consent.

Nature of the Movant's Interest.

Miss Buhai is vitally interested in the disposition of the present case because certain of the crucial issues¹ contained therein are akin to issues involved in her present efforts to obtain admission to the Bar of the State of California. She has passed a California bar examination and otherwise complied with the educational requirements of the California Bar, but the State Committee of Bar Examiners has refused to certify her for admission thereto because of: (1) her past membership in the Communist Party and certain other organizations, and (2) her refusal to name the individuals with whom she associated during the period of her Party membership.

Miss Buhai was called to testify before a sub-committee of the State Bar because of information which had been received to the effect that she had been a member of the Communist Party and certain other organizations. She testified fully and freely as to the commencement and termination of her Party membership sometime prior to her taking her said Bar examination and as to the innocent nature of her activities therein during such membership period; she refused, however, to name any persons with whom she had associated during the period of her membership on the ground that to do so would harm innocent individuals.

¹Two of the grounds relied on by the Court below in the present case—criminal arrests and use of aliases—were not present in Miss Buhai's case.

At the conclusion of an examination by a sub-committee and full Committee of Bar Examiners of the State Bar, Miss Buhai was refused certification on the grounds above stated; she filed a petition for hearing in the Supreme Court of the State of California, which is now pending. A crucial issue in that petition² concerns the right of the State Bar to refuse admission to movant on the basis of her past membership in the Communist Party, which is likewise one of the central issues in the *Schware* case. Since this Court's disposition of that issue in the *Schware* case may well affect the ultimate outcome of Miss Buhai's case, she regards it as essential that all questions be fully and adequately presented to this Court in the present case and hence moves for leave to file the annexed brief as *Amicus Curiae*.

Questions That Will Not Be Adequately Presented by the Parties.

On the basis of an examination of the Petition for Certification in this case, and the Response thereto, movant believes that a vital question of law has not been and will not be adequately presented by the parties. That question is whether Petitioner *Schware*'s right of free political association has been infringed by the action of the State Bar in denying him admission.

We shall attempt to demonstrate first, that there is a constitutionally protected right of free political association; and secondly, that the Committee of Bar Examiners

²Miss Buhai has also raised other constitutional issues.

in the present case has infringed that right by virtue of its intrusion into the area of past political associations and its refusal to admit petitioner on the basis thereof. We shall further attempt to show that this right of free political association has deep constitutional and historical roots and is also of great pertinent and contemporary value.

ISAAC PACT,

CLORE WARNE,

STANLEY FLEISHMAN,

By CLORE WARNE,

Attorneys for Amicus Curiae.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1956.

No. 92.

RUDOLPH SCHWARE,

Petitioner,

vs.

BOARD OF BAR EXAMINERS OF THE STATE OF NEW
MEXICO,

Respondent.

BRIEF AMICUS CURIAE.

Summary of Argument.

The present case involves a serious violation of Petitioner's right of free political association.

One of the most valued and important rights of a citizen of a free country is the right to freely affiliate and associate with groups organized and acting for political purposes. Once political views are translated into action, in the form of sabotage, violence, etc., the government may, of course, intervene; but as long as a group of individuals operates at the level of advocacy and persuasion, governmental intervention or inquiry should not be sustained.

This right of free political association is deeply rooted in the history and traditions of our country. It has been recognized since the earliest days of our Republic. It has been ratified by consistent practice down through the years. Moreover, it is of inestimable value and importance at the present time; it serves as the foundation for the various political groupings which play such an important role, through political education and otherwise, in our present complex society, and likewise serves as the only effective means of voicing political dissent.

It is not surprising, therefore, to find that the courts have recognized that this right of political association is constitutionally protected. In part, such protection is inherent in the very nature of our constitutional democracy; in part, it flows from the fundamental guarantees contained in the Bill of Rights.

The existence of this right of free political association creates an area of political activity as to which no governmental or quasi-governmental agency may inquire, and into which no such agency may intrude. Yet that is precisely what the State Bar Committee has done in the present case in refusing admission to Petitioner on the basis of his past membership in the Communist Party. This action of the State Bar, which was upheld by the Supreme Court of New Mexico, therefore constitutes an unwarranted invasion of Petitioner's constitutionally protected right of political association.

ARGUMENT

I.

Freedom of Political Association Has Deep Historical Roots.

The Right of Free Political Association Was Well Recognized in the Formative Era of Our Country.

Abroad, it was reflected in the principles enunciated by the French Revolutionists of the period, whose writings had such tremendous impact on our own political theorists. It received strong support in England by consistent acquittals in prosecutions under the then English statute of sedition.

See, e. g.,

Sutherland, *British Trials for Disloyal Association During the French Revolution*, 34 Cornell L. Q. 303 (1949).

A similar attitude was voiced by our own political theorists, for as Schattschneider observes:

“ . . . The authors of the Constitution refused to suppress the parties by destroying the fundamental liberties in which parties originate. They or their immediate successors accepted amendments that guaranteed civil rights and thus established a system of party tolerance, i. e., the right to agitate and to organize. . . . ”

Schattschneider, *American Government in Action* (1942), p. 7.

Thus, Madison, while explaining in the celebrated tenth paper of the *Federalist* how the new Constitution was designed to mitigate certain evils of faction, was careful to point out that liberty of association must remain unfettered in the new democracy.

"There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

"There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

"It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

Beard, The Enduring Federalist, pp. 68-69.

Moreover, Madison himself recognized that political associations were inevitable in a democracy. (*The Enduring Federalist*, *supra*, pp. 69-70.) Indeed, such associations as the Boston Caucus Club¹ ante-dated our Republic,

¹ . . . At any rate, early in our history small groups began to act in concert by agreeing on candidates and policies they would support before the electorate as a whole. An early example of this sort of activity was recorded in February, 1763, by John Adams in his diary:

"This day I learned that the caucus club meets at certain times in the garret of Tom Dawes, the adjutant of the Boston regiment. He has a large house, and he has a moveable partition of his garret, which he takes down, and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the room to the other. There, they drink flip, I suppose, and there they choose a moderator who puts questions to the vote regularly; and, selectmen, assessors, collectors, firewards, and representatives are regularly chosen before they are chosen in the town." Key, *Politics, Parties, and Pressure Groups* (3d ed.) 1952, pp. 217-218.

and others, such as the Federalist and Republic movements, developed shortly after its formation.

Thus, DeTocqueville, commenting on the American scene a mere half century after the adoption of the Federal Constitution, stressed the importance which the right of free political association had assumed in America even at that early date:

“In America the liberty of association for political purposes is unbounded. . . .

* * * * * * *

“It must be acknowledged that the unrestrained liberty of political association has not hitherto produced; in the United States, those fatal consequences which might perhaps be expected from it elsewhere. The right of association was imported from England, and it has always existed in America; so that the exercise of this privilege is now amalgamated with the manners and customs of the people. At the present time the liberty of association is become a necessary guarantee against the tyranny of the majority. In the United States, as soon as a party is become preponderant, all public authority passes under its control; its private supporters occupy all the places, and have all the force of the administration at their disposal. As the most distinguished partisans of the other side of the question are unable to surmount the obstacles which exclude them from power, they require some means of establishing themselves upon their own basis, and of opposing the moral authority of the minority to the physical power which dominates over it. Thus a dangerous expedient is used to obviate a still more formidable danger.

“The omnipotence of the majority appears to me to present such extreme perils to the American Re-

publics that the dangerous measure which is used to repress it seems to be more advantageous than prejudicial. And here I am about to advance a proposition which may remind the reader of what I said before in speaking of municipal freedom. There are no countries in which associations are more needed, to prevent the despotism of faction or the arbitrary power of a prince, than those which are democratically constituted. In aristocratic nations the body of the nobles and the more opulent part of the community are in themselves natural associations, which act as checks upon the abuses of power. In countries in which these associations do not exist, if private individuals are unable to create an artificial and a temporary substitute for them, I can imagine no permanent protection against the most galling tyranny; and a great people may be oppressed by a small faction, or by a single individual, with impunity. . . .

"It cannot be denied that the unrestrained liberty of association for political purposes is the privilege which a people is longest in learning how to exercise. If it does not throw the nation into anarchy, it perpetually augments the chances of that calamity. On one point, however, this perilous liberty offers a security against dangers of another kind; in countries where associations are free, secret societies are unknown. In America there are numerous factions, but no conspiracies."

1 DeTocqueville, *Democracy in America* (Rev. ed. 1900), pp. 191, 193, 196.

II.

Freedom of Political Association Is of the Utmost Importance Today.

We Need Not Look to History Alone to Justify the Right of Free Political Association, for That Right Is of Inestimable Value in Our Modern Society; Where It Serves as a Core Concept of Our Democratic Theory.

Thus, even groups which have had little chance to elect candidates have made immeasurable contributions in the form of political education. Indeed, many of our currently accepted programs originated with minor party movements, some of which were highly unpopular in their day. As Judge Wyzanski has noted:

“ . . . [T]he heart of the principle of freedom of association is our confidence that by the stimulus of fellowship men will not only realize their full potentialities but will bring to the surface and to fulfillment the new adventurous ideas which the mass has not yet discerned but on which their future progress may be built. Freedom of association like the other basic freedoms looks at all conflicts of opinion and of doctrine *sub specie aeternitatis*. And it is ever mindful of the profound wisdom of Heraclitus' gnome, 'That which opposes, fits. From different tones comes the finest tune.' ”

Wyzanski, *The Open Window and The Open Door*, 35 Cal. L. Rev. 336, 351 (1947).

Moreover, the right of free political association serves not only as the basis for political parties in the traditional sense, but also as the foundation for the various pressure groups which assert such tremendous influence on legis-

lative and exclusive action in our present complex society. As Professor Abernathy observes:

" . . . Associations have a place of particular importance in a democracy, whether they are associations of laborers, professional men, or electors and office-seekers. They serve as a training ground for group participation, organization and management of people and programs, and for democratic acceptance of the majority will. They can also serve as a potential influence for improvement of communication between the individual and the government. Concerted demands for action by associations of people have a better chance for accomplishing the desired governmental action than do scattered individual requests. And the information furnished to administrators and legislators by private associations of various kinds is in many instances vital to the intelligent treatment of particular problems."

Abernathy, *Right of Association*, 6 S. Car. Law Q. 32, 75-76 (1953).

Again, as Professor Abernathy has observed:

"In addition to the educational and sub-governmental values, there is a third. Associations operate as a check on the tyranny of the majority and at the same time the possible despotism of a few. Both are inherent dangers in a democracy. . . ."

Right of Association, supra, 6 S. Car. Law Q. 32, 39.

In short, the present importance of the right of free political association is no less impressive than the pervasiveness of the politically active groups which operate under its aegis.

III.

The Right to Free Political Association Is Constitutionally Protected.

Although there is no express mention of the right to free political association in our Federal Constitution,¹ it is clearly reserved to the people as an inherent part of our constitutional scheme.

It is clear that our Constitution contemplates the reservation of rights in the people in addition to those rights expressly enumerated.

See, *e. g.*, Amendments IX and X.

It is equally clear that among these reserved rights is the right of the individual to function politically in association with others.

Such a right is widely recognized as inherent in our concept of democratic government.

Britton v. Board of Commissioners, 129 Cal. 337, 61 Pac. 1115 (1900);

Sarlls, City Clerk v. State of Indiana, ex rel. Trimble, 201 Ind. 88, 106, 166 N. E. 270 (1929);

¹The American Law Institute's *Statement of Essential Human Rights* (1944) provides in Article 5:

"Freedom to Form Associations. Freedom to form with others associations of a political, economic, religious, social, cultural, or any other character for purposes not inconsistent with these articles is the right of every one.

"The state has a duty to protect this freedom."

The comment on this Article states in part:

"Provisions for establishing a right comparable to that in this Article are contained in the current or recent constitutions of thirty-nine countries."

Davidson v. Hansen, 87 Minn. 211, 219, 92 N. W. 93 (1902);

State ex rel. Punch v. Kortjohn, 246 Mo. 34, 150 S. W. 1060 (1912);

Starr, *The Legal Status of American Political Parties*, 34 *American Political Science Rev.* 439, 444 (1940);

1 De Tocqueville, *Democracy in America* (Rev. 1900), 196;

Corry, *Elements of Democratic Government* (New ed., 1951), pp. 324-325.

As one writer has observed:

"Without attempting to pin the matter to any particular constitutional guaranty, judges seem willing to hold that the people have an inherent right to organize political parties. The right is held to exist naturally as an incident to free government. It may be impossible to justify this doctrine on a strictly legal basis; but at any rate it is philosophically sound.

Starr, *The Legal Status of American Political Parties*, *supra*, at p. 445.

This judicial attitude is reflected in numerous cases.

Thus, in *Davidson v. Hansen*, *supra*, 87 Minn. 211, the Socialist Labor Party sought to prevent another political organization from placing its nominee for governor on the state ballot under the newly adopted name "Socialist", which was claimed to infringe the label of the Socialist Labor Party. A state statute prohibited political parties from interfering with political titles previously adopted

by other political organizations. The Socialist Party contended that the Socialist Labor Party had ceased to be a political entity entitled to the benefits of the statute because it had polled less than one per cent of the vote at the previous election. In rejecting this contention, the court stated:

"But a controlling view of this matter lies deeper than the critical interpretation of the language of any statute, for the courts should not interpret any legislative act to authorize an arbitrary power by a political party to exclude the substantial rights of citizens to agitate for the adoption of civic results through partisan efforts and recognized methods. Political agitation is indispensable to the well-being of the government itself. It is necessary to attain progress and the maintenance of our free institutions. Without its benefits our commonwealth would be bereft of efficient vital force, and in danger of the evils of absolutism. . . ."

87 Minn. 219.

Again, in *Sarlls, City Clerk v. State of Indiana, ex rel. Trimble, supra*, 201 Ind. 88, 106, the court observes:

"The people have an inalienable right to organize and operate political parties, . . ."

This concept of the individual's right to freely associate with others at the political level is not a mere recent development. "Thus De Tocqueville, writing a century ago, observed:

"The most natural privilege of man, next to the

exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to be almost as inalienable in its nature as the right of personal liberty.

1 De Tocqueville, *Democracy in America*, *supra*, at p. 196.

Indeed, the Bill of Rights, viewed as a whole, obviously was designed to protect the individual in his political associations.

The First Amendment's guarantees of free speech, press and assembly clearly must include free political expression and free political assembly, for the fear of political oppression was a prime motivating factor in the adoption of those rights. Free political speech and assembly, in turn, must include the right to come together, choose candidates, campaign for public office and attempt to promote a group program. Otherwise those freedoms would be emptied of all significance, for our political processes are geared primarily to group action. It is only through such groupings that an individual may attain a measure of political significance. Only through such group action may political dissent be registered effectively.

This relationship of the Bill of Rights' guarantees to freedom of political association has been recognized by courts and writers alike.

See, e. g.,

Wieman v. Updegraff, 334 U. S. 183, 194-195 (1952);

Garner v. Board of Public Works, 341 U. S. 716, 727-728 (1951);

DeJonge v. Oregon, 299 U. S. 353, 364-365 (1937);

Whitney v. People of State of California, 274 U. S. 357, 379 (1927);

Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 252, 69 N. E. 2d 1115 (1946);

Emerson and Haber, *Political and Civil Rights in the United States* (1952), Ch. III, p. 248;

Abernathy, *Right of Association*, *supra*, 6 S. Car. Law. Q. 32, 33, 34 (1953-54);

Schattschneider, *American Government in Action* (1942) 1, 7.

As Emerson and Haber have noted:

"The United States Constitution nowhere explicitly recognizes a right to form political organizations. Indeed many of the founding fathers looked upon political parties with some suspicion, referring to them as 'factions.' Yet it is generally accepted that the rights in the First Amendment to freedom of speech, press and assembly, and to petition the government for redress of grievances, taken in combination, establish a broader guarantee to the right of political association. . . ."

Political and Civil Rights in the United States, *supra*, p. 248.

Again, Professor Abernathy states:

"Whether or not freedom of association is encompassed by freedom of assembly, it is at least a right cognate to the latter. And its importance in a democratic society cannot be overestimated. . . ."

" . . . If parties are a natural result of freedom

operations of government, then the right to form parties must be protected to safeguard the basic rights of the people. . . . ”

Abernathy, *Right of Association*, *supra*, pp. 33, 44.

In *Bowe v. Secretary of the Commonwealth*, *supra*, 320 Mass. 230, the court held that a law which would have prohibited labor unions and any person acting in their behalf from making political contributions was not a proper subject for an initiative petition. The court explained (320 Mass. at 252):

“One of the chief reasons for freedom of the press is to insure freedom, on the part of individuals and associations of individuals at least, of political discussion of men and measures, in order that the electorate at the polls may express the genuine and informed will of the people. Brandeis, J., in *Whitney v. California*, 274 U. S. 357, 375. Hughes, C. J., in *Stromberg v. California*, 283 U. S. 359, 369. Individuals seldom impress their views upon the electorate without organization. They have a right to organize into parties, and even into what are called ‘pressure groups,’ for the purpose of advancing causes in which they believe. They have a right to engage in printing and circulating their views, and in advocating their cause in public assemblies and over the radio. All this costs money, and if all use of money were to be denied them the result would be to abridge even to the vanishing point any effective freedom of speech, liberty of the press, and right of peaceable assembly.”

But we need not look solely to the views of writers and other courts on this matter, for members of this Court

Thus, in *De Jonge v. Oregon, supra*, Mr. Chief Justice Hughes, speaking for the Court, stated (299 U. S. at 364-365):

“Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution (citing cases). The right of peaceful assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States v. Cruikshank*, 92 U. S. 542, 552: ‘The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.’ The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere.’ For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. (citing cases.)

“These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, and free assembly in order to maintain

the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Again, in *Whitney v. California, supra*, Mr. Justice Brandeis, in a concurring opinion joined by Mr. Justice Holmes, stated (274 U. S. at 379):

" . . . I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the State court cannot be disturbed."

More recent opinions have voiced similar views. Thus, in *Garner v. Board of Public Works, supra*, 341 U. S. at 727-728, Mr. Justice Frankfurter, concurring and dissenting in part, declared:

"If this ordinance is sustained, sanction is given to like oaths for every governmental unit in the United States. Not only does the oath make an irrational demand. It is bound to operate as a real deterrent

How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'? All but the hardies may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes. Throughout our history they have been manifested in 'joining.' See Arthur M. Schlesinger, Sr., *Biography of a Nation of Joiners*, published in 50 *American Historical Review* 1, reprinted in Schlesinger, *Paths to the Present*, 23.

"The needs of security do not require such curbs on what may well be innocuous feelings and associations. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service."

Again, in *Wieman v. Updegraff*, *supra*, Mr. Justice Frankfurter, in a concurring opinion joined by Mr. Justice Douglas, noted (344 U. S. at 194-195):

"The case concerns the power of a State to exact from teachers in one of its colleges an oath that they are not, and for the five years immediately preceding the taking of the oath have not been, members of any organization listed by the Attorney

the statute, as 'subversive' or 'Communist-front.' Since the affiliation which must thus be forsworn may well have been for reasons or for purposes as innocent as membership in a club of one of the established political parties, to require such an oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. See Arthur M. Schlesinger, Sr., *Biography of a Nation of Joiners*, 50 *Am. Hist. Rev.* 1 (1944), reprinted in *Schlesinger, Paths To The Present* 23. Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

Certainly the "free play of the spirit" alluded to by Mr. Justice Frankfurter in the case of teachers is no less essential in the case of lawyers.

IV.

The Present Case Represents a Serious Inroad on Freedom of Political Association Which Should Not Be Sanctioned by This Court.

Insofar as the State Bar Committee has rejected Petitioner's application because of his past innocent membership in the Communist Party, there has been a serious infringement of Petitioner's right of free political association.

Clearly, that right creates an area of political activity which is protected from action and inquiry by governmental and quasi-governmental agencies. The existence of such protected areas has been recognized by this Court. Thus, in *Quinn v. United States*, 349 U. S. 155, 161 (1955), Mr. Chief Justice Warren, speaking for the Court, stated:

"But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

If such limitations are to be imposed upon the United States Congress, with all of its powers and prerogatives, surely a Committee of the State Bar, whose sole function

is to determine the qualifications of candidates for admission to the Bar, cannot be permitted to roam at will through the area of political beliefs and associations. Even less may such a Committee refuse admission to the Bar on the basis of such a foray.

Conclusion.

The right of free political association for which we are contending might well be described as the "touchstone of democracy".

Such a right finds no place in a totalitarian regime. Indeed, the absence of free political association and the resulting one-party concept furnish a common denominator for the totalitarian countries.

In the dictatorial regimes, freedom of political association is unthinkable. It is equally unthinkable that our own constitutional democracy could continue to function without this basic freedom. As one writer has observed:

"Freedom to think and speak will avail little unless it is supported by the further freedom to assemble peaceably for discussion, in large groups or small, and to associate together for the common purposes discovered by discussion. Not even the all-powerful dictator can enforce directly a ban on thinking. But by rigid control of all the means of communication, and of the right of public meeting and association, he can go far to ensure that the thinker will keep his thoughts to himself. Liberal democracy is dependent also on freedom of peaceable assembly and association."

Corry, *Elements of Democratic Government*, *supra*, pp. 324-325.

Nevertheless, the past few years have witnessed repeated actions on the part of governmental and quasi-governmental agencies tending to undermine the right of free political association.

Professor Abernathy has aptly commented on the dangers of such a trend¹:

" . . . At the very least Americans will become, indeed they have become, so cautious about joining associations that only those ultra-acceptable ones can recruit new members. And the contributions to a democratic society which arise from free association will be severely reduced if not lost.

" . . . The Communist threat is a real and present danger and it cannot be ignored. But neither can Americans afford to destroy the whole democratic society in order to root out one evil. The contributions made by exercise of the broad freedom to associate are too important to the proper operation of a democratic system to be seriously impaired by hasty, ill-considered measures."

Abernathy, *Right of Association, supra*, 6 S. Car. Law Q., at pp. 72-73, 77.

¹Professor Abernathy notes the following extreme example:

" . . . The City of Birmingham, Alabama, passed an ordinance in 1950 which provided a \$100 fine and a maximum of 180 days in jail for each day that a known Communist remained in the city. The ordinance further provided that membership in the Communist Party would be presumed if a person 'shall be found in any secret or non-public place in voluntary association or communication with any person or persons established to be or to have been members of the Communist Party.' This is guilt by association with a vengeance." Abernathy, *Right of Association, supra*, at page 61.

The present case, which represents a further step in this undermining process, affords this Court an excellent opportunity to halt this dangerous trend and revitalize the right of free political association. We respectfully urge this Honorable Court to take advantage of the opportunity thus presented and thereby vindicate this fundamental right.

Respectfully submitted,

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